SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1712

LOCAL 445, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

vs.

SPERRY SYSTEMS MANAGEMENT DIVISION, SPERRY RAND CORPORATION,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1973

No.

LOCAL 445, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
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VS.

SPERRY SYSTEMS MANAGEMENT DIVISION, SPERRY RAND CORPORATION,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Local 445, International Union of Electrical, Radio and Machine Workers, AFL-CIO, intervenor in the proceeding below, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit entered in this case.

Opinions Below

The opinion of the Court of Appeals (App. A, pp. 1-14) is not yet officially reported (85 LRRM 2521). The decision and order of the Board in the underlying complaint case (App. C, pp. 1-14) are reported at 202 NLRB No. 18.

Jurisdiction

The judgment of the Court of Appeals (App. B, pp. 1-2) was entered on February 15, 1974. The jurisdiction of this Court is invoked under 28 USC 1254(1).

Questions Presented

1. Whether a union violates §8(b)(3) of the Act by peacefully attempting to preserve bargaining unit work through enforcement of a contract provision requiring the employer to establish comparable or superior terms and conditions of employment at its other plants to which unit work is being diverted.

2. Whether a union may properly be held to have violated §8(b)(3) of the Act by attempting to enforce a work preservation clause, first through arbitration and then by seeking compliance with the arbitration award where the Board's decision upholding the propriety of both the award and the union's enforcement efforts is overruled and the case remanded by a Court of Appeals.

Statutes Involved

The relevant provisions of the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 USC 151 *et seq.*) are set forth in App. K, *infra*, pp. 1-2.

Statement

A. The Union's Efforts to Enforce the Work Preservation Clause

On June 6, 1962, the Union was certified as the exclusive bargaining representative for a unit of technicals including various categories of draftsmen, at the Company's Metropolitan New York plants (App. D, p. 3; E39)[1] and since 1964 each of its successive collective agreements have contained under Article I, the unequivocal commitment that "This Agreement shall apply to all plants now operated by the Employer wherever situated" (App. C, pp. 2-3; A6, 56-58, 130, E61, 42).

In 1970, the Company established a new facility in Vallejo, California, and there employed three (3) draftsmen to perform work of the same type being performed by draftsmen at the Company's New York plants (App. C, p. 2, App. D, p. 4; A58, 100, 150-154). The Union upon learning that the Vallejo draftsmen were receiving wages and fringe benefits well below its New York contract minimums and that the Company contemplated expanding the Vallejo facility and fearing an adverse impact on employment in the New York plants filed a grievance in November 1970, demanding that its contract be applied at Vallejo (App. C, p. 2, App. D, p. 4; A59, 100, 134-136, E103).

The union grievance was duly processed to arbitration before Arbitrator Benjamin C. Roberts and on April 19, 1971, Arbitrator Roberts issued his opinion and award (App. J, pp. 1-19) holding the New York agreement applicable to the Vallejo facility for all purposes except

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[1] "A" refers to the printed appendix and "E" to the printed exhibits in the court below, copies of which have been lodged with the Clerk. References preceding a semicolon are to the Board's findings, and those following are to the supporting evidence.

Union recognition. The Arbitrator reasoned that while the representation provisions could not lawfully be applied to the Vallejo draftsmen (App. C, pp. 2-3; E124-125), the latter nevertheless were governed by the wage schedule and other terms of employment contained in the agreement (App. C, p. 3, App. D, p. 6; E126).

The Union promptly sought compliance with the Roberts' award (App. D, p. 7; A61, E129) and when the Company refused to comply, filed a second grievance on August 25, 1971 (App. D, p. 8; A67, E145). Another arbitrator was designated to hear this grievance but because of the then pending litigation the hearing was indefinitely postponed (App. D, p. 9; A80-81, E152-157).

On July 20, the Company filed a petition in the New York County Supreme Court to modify the arbitrator's award insofar as it applied the New York agreement to Vallejo, and on November 2, 1972, the Court (Amsterdam, J.) granted the Company's petition (App. H). The judgment modifying the award (App. I) was affirmed without opinion by the Appellate Division, First Department, of the New York Supreme Court on June 19, 1973 (App. F), and the Union's application for leave to appeal was denied by the New York Court of Appeals on October 12, 1973 (App. E).[2]

B. The Proceedings Before the Board

Following the issuance of the Roberts' award the Union had on May 10, 1971, petitioned for a residual drafting-clerical unit at Vallejo (App. D, p. 9; A62, E133) and

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[2] *Sperry Division of Sperry Rand Corporation* v. *Local 445, International Union of Electrical, Radio and Machine Workers, AFL-CIO* (Special Term, Amsterdam, J.) 80 LRRM 2061, (not officially reported); affirmed w.o. opinion, 42 A.D. 2d 691; Motion for Leave to Appeal denied 33 NY 2d 517.

in the NLRB election held on August 5, 1971, the Union lost by a vote of two to nothing with one ballot challenged (App. C, p. 3, App. D, p. 10; A62, 67, E138-139).

On August 2, 1971, the Company responded to the Union's second grievance by filing an unfair labor practice charge (App. D, p. 8; E2, 7). This Petition concerns the ultimate resolution of the proceeding initiated by the charge. The Company charge alleged that the Union, in violation of §8(b)(3) of the Act had failed to bargain in good faith with respect to the certified New York unit by seeking, via the grievance and arbitration route, to represent the Vallejo employees.

A complaint was issued by the Regional Director but, following an evidentiary hearing, the Administrative Law Judge recommended dismissal (App. D, p. 23). The Board, after granting oral argument, by a 3 to 2 vote adopted the findings of the Administrative Law Judge and dismissed the complaint, ruling that as interpreted by the arbitrator Article I neither "contravenes basic statutory policy", nor necessarily "confers representational rights for non-New York employees" upon the Union, and that the Union's efforts to secure compliance with that award did not disrupt "the on-going bargaining relationships in the New York units" (App. C, pp. 7-8).

C. The Decision of the Court of Appeals

The Court below, in granting the Company's petition to review the Board's order, held (1) that the Union had unlawfully attempted to represent workers outside the New York unit and that the Board's contrary finding that the Union's efforts were intended to protect the job security of its New York members was not supported by substantial evidence; and (2) that "regardless of the Union's motives in seeking enforcement of the arbitration

award" it committed an unfair labor practice because "the wages and working conditions of the Vallejo employees was not a permissible subject of bargaining in the New York unit" (App. A, pp. 9-11).

Reasons for Granting the Writ

The Court of Appeals holding that the Union cannot lawfully enforce the work preservation provisions of its contract by insisting that minimum standards be applied at other Company plants, is erroneous and contrary to principles enunciated in the decisions of this Court. This issue is of substantial importance in the administration of the National Labor Relations Act, affecting large numbers of employees who are presently afforded protection under similar contract clauses. Moreover, the decision below poses an immediate threat to the orderly and peaceful development through good faith bargaining of work preservation guaranties required to meet the new challenge of the burgeoning multiplant conglomerates. Accordingly, prompt resolution by this Court of the issues presented is warranted.

1. Sections 8(b)(3), 8(a)(5) and 8(d) of the Act "establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment' * * *." *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203, 210 (1964). The statutory obligation to bargain, though normally concerned with the working conditions of the employees in the unit represented by the union, also encompasses matters involving individuals outside the unit which have a direct bearing on employees within the unit.

The law is clear that contract clauses do not offend the basic policies of the Act because they have an incidental impact on non-unit employees so long as their dominant purpose is to preserve the integrity of the bargaining unit. Thus, in *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283 (1959), the Court upheld the disputed contract provision between the union and the trucking employers which stipulated a minimum rental schedule applicable to owner-driven vehicles as a valid work preservation clause and a mandatory subject of bargaining (358 U.S. at 294-295).

Again, in *Fibreboard Paper Products, supra*, the Court held "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment" to be a mandatory subject of bargaining (379 U.S. at 215). The Court went on to limit this decision by observing that it did not "encompass other forms of contracting out or subcontracting which arise daily in our complex economy." *Ibid.*

The Court has also refused to condemn contract provisions limiting subcontracting even though their effect is to give the union influence over the working conditions of non-unit employees insofar as *their* employers seek subcontracts from the primary employer. Thus, in *National Woodwork Manufacturer's Assoc.* v. *N.L.R.B.*, 386 U.S. 612, 642 (1967), the Court emphasized that "the 'termination of employment which . . . necessarily results from the contracting out of work performed by members of the established bargaining unit' . . . is 'a problem of vital concern to labor and management' ", stating that "[t]he touchstone is whether the challenged agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees". Finding that "the union's *objective was preservation of work*

for [*unit*] *employees,*" the court concluded that the disputed provisions were not repugnant to the Act (386 U.S. at 645).

Here the Board's determination of the legitimacy of the Union's work preservation objectives was "entitled to deference it did not receive" *Iron Workers* v. *Perko,* 373 US 701, 706 (1960). See also *Meat Cutters* v. *Jewel Tea,* 381 US 676, 685-686 (1965).

2. Under Section 9(b) of the Act, the Board is responsible for defining the units in which collective bargaining may appropriately be conducted and its determination is conclusive on the parties (*Brown* v. *Pacific Telephone and Telegraph Co.,* 218 F.2d 542, 544 (C.A. 9, 1954); *Douds* v. *International Longshoremen's Association,* 241 F.2d 278, 282 (C.A. 2, 1957).

Thus, a party breaches its bargaining obligations "when, after the Board has decided what the appropriate bargaining unit is, one party over the objection of the other demands a change in that unit." The vice in such conduct is that it "denies the Board the ultimate control of the bargaining unit and disrupts the bargaining process itself." *Douds* v. *International Longshoremen's Assn.,* 241 F.2d 278, 283 (C.A. 2, 1957). See also *International Longshoremen's Assoc.* v. *N.L.R.B.,* 277 F.2d 681, 683 (C.A. D.C. 1960); *AFL-CIO Joint Negotiating Committee for Phelps Dodge* v. *N.L.R.B.,* 470 F.2d 722, 726 (C.A. 3, 1972), cert. den. 409 U.S. 1059.

It is accordingly a violation of Section 8(b)(3) for a union to assert its continued right to represent certain employees covered by an unexpired contract after the Board has officially determined that these employees are included in a unit which another union represents. *Smith Steel Workers* v. *A. O. Smith Corp.,* 420 F.2d 1 (C.A. 7,

1969). Such assertion of representational rights by the contractual union is proscribed since it conflicts with the statutory duties officially imposed on the second union.

There was no second union in the case at bar. Moreover, substantial evidence supports the Board's findings that the Union's dominant purpose was to protect the job security of the New York draftsmen and that the Union had expressly disclaimed any representational rights as to the Vallejo unit (App. D, pp. 7-8, App. C, pp. 3-4; A124-125, 137, 140-150, 154-161).

3. The Union acknowledges that the work preservation clause it succeeded in negotiating is only a *permissive subject* of bargaining (*District 50, United Mine Workers of America (Central Soya Co., Inc.)*, 142 NLRB 930, 939 (1963)), and that it hence would have been unlawful to "insist upon" this protection. *N.L.R.B.* v. *Wooster Division of Borg-Warner Corporation*, 356 U.S. 342 (1958). But having successfully negotiated on this permissive subject the Union was not precluded from seeking to enforce its contract rights. *Chemical Workers, Local No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

The court below plainly misapprehended the limitation of the holding in *Oliver, supra*, by the Court in *Pittsburgh Plate Glass, supra*, as outlawing all contract clauses affording protection against individuals outside the unit unless a "vital effect on the unit employees" (404 US at 179) can be demonstrated. This "vital affect" criterion was fashioned by the Court for determination of the existence of a *mandatory* subject of bargaining and simply has no application to a *permissive* subject lawfully incorporated as a term of the collective agreement. Nor did the Court hold that contract terms dealing with permissive subjects may not be enforced. It went no further than to rule that the Union's remedy would not lie in an unfair-labor-practice proceeding.

4. Section 8(b)(3) of the Act cannot be fairly construed to preclude the union from proceeding by arbitration to enforce Article 1 of its agreement. Indeed, this Court in *Pittsburgh Plate Glass, supra,* expressly held that a union's remedy for the unilateral breach of a permissive term lies in an action for breach of contract. Moreover, a comparable question arises under the secondary boycott provisions of the Act (Section 8(b)(4) and 8(e)) which permit a union to enter into a "hot cargo" agreement with an employer relative to the contracting of work at construction sites, but prohibit it from "coerc[ing]" that employer to compel him to live up to the agreement. The Fifth Circuit has held that this prohibition against "coercion" does not extend to judicial enforcement of such agreements noting that "Congress used 'coerce' . . . as a word of art [which] means no more than *non-judicial acts of a compelling and restraining nature,* applied by way of concerted self-help, consisting of a strike, picketing or other economic retaliation or pressure in the background of a labor dispute." *Local 48, Sheet Metal Workers* v. *Hardy Corp.*, 332 F.2d 682, 686 (C.A. 5, 1964) (emphasis supplied). To hold otherwise, the court pointed out ". . . would prevent the judicial enforcement of an agreement, the validity of which was expressly preserved by [Congress], when there is nothing in the language of the statute or in the legislative history to indicate that the doors of the courts should be closed under the circumstances. Such a result is not lightly to be inferred. . . . " (332 F.2d at 687-688).

Similarly, in *Clyde Taylor Co.*, 127 NLRB 103 (1960) cited with approval in *N.L.R.B.* v. *Nash-Finch Co.*, 404 U.S. 138, 142 (1971), the Board declined to find that the employer had violated Section 8(a)(1)'s prohibition against "coerc[ing] employees in the exercise of the rights guaranteed in Section 7" by obtaining a state

court injunction banning peaceful picketing by the union in protest against the employer's unlawful discharges. Even though the Board viewed the injunction as part and parcel of the employer's unlawful scheme to frustrate organization, it concluded that it "should accommodate its enforcement of the Act to the rights of all persons to litigate their claims in court, rather than condemn the exercise of such rights as an unfair labor practice" (127 NLRB at 109).

Here there is not a scintilla of evidence that the Union did anything more than engage in the peaceful pursuit of its contract rights under the procedures prescribed in the collective agreement (App. C, p. 7).

The decision of the court below undercuts current industrial practice of subjecting work preservation issues and subcontracting clauses to "the mediatory influence of negotiations" *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 211 (1964), and is contrary to the salutory trend accommodating the scope of bargaining to the changing needs and interests of the parties.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A, Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 296—September Term, 1973

Argued January 8, 1974 Decided February 15, 1974

Docket No. 73-1621

SPERRY SYSTEMS MANAGEMENT DIVISION, SPERRY RAND CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

LOCAL 445, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Intervenor.

Before DANAHER,* LUMBARD and TIMBERS, *Circuit Judges*

LUMBARD, Circuit Judge:

Pursuant to §10(f) of the National Labor Relations Act, 29 U. S. C. §160(f), the Sperry Systems Management Division of the Sperry Rand Corporation (the Company)

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* Senior Circuit Judge of the District of Columbia Circuit, sitting by designation.

petitions this court to review and set aside an order of a divided National Labor Relations Board which on March 5, 1973 dismissed a complaint against Local 445 of the International Union of Electrical, Radio and Machine Workers, AFL-CIO (the Union), 202 N. L. R. B. No. 18. The complaint charged, and the Company here argues, that the actions of Local 445 constituted the unfair labor practice of refusing to bargain collectively in violation of §8(b)(3) of the Act, 29 U. S. C. §158(b)(3). We find that on this record the Board erred in dismissing the complaint, and, therefore, we grant the petition, set aside the Board's order, and remand for further proceedings.

I.

On June 6, 1962, the Board certified Local 445 as the bargaining representative for certain of the Company's technical employees at its plants in "metropolitan New York City, including Nassau and Suffolk Counties [the remainder of Long Island], on temporary assignments wherever located from said plants, and on temporary or permanent assignments from said plants to customer or vender installations, wherever located." At all times relevant to this proceeding, Article 1 of the collective bargaining agreement between the Company and the Union provided, "This Agreement shall apply to all plants now operated by the Employer, its successors and assigns, wherever situated." This discrepancy between the certification and the agreement concerning the proper collective bargaining unit would lead to complex litigation of which the instant case is but a part.

In the spring of 1970, the Company commenced operations in a new facility in Vallejo, California, in which it employed, among others, three draftsmen who per-

formed similar [sic] to that performed by Local 445's members on Long Island. No draftsman was transferred to the California facility from the New York City area.[1] In November 1970 the Union, having learned that the three employees at Vallejo had been given different titles and lesser pay than workers doing comparable work in New York, filed a grievance with the Company which demanded that the Company apply the New York City agreement to the Vallejo employees.

The Company denied the grievance and the matter went to arbitration pursuant to the contractual procedures. The issue presented at a hearing before Arbitrator Benjamin C. Roberts was "[w]hether the technical personnel performing drafting work at Vallejo, California, are under the coverage of the collective bargaining agreement with Local 445." On April 19, 1971, Arbitrator Roberts issued a 22-page opinion in which he concluded that the parties in Article 1 did mean to apply the agreement to all of the Company's plants, wherever located. He, however, said that he could not apply the representation provisions of the agreement to the Vallejo employees without violating their right under the Act not to organize. Consequently, he required compliance only with the wages and other conditions of employment, which provisions he felt could be legally enforced.

His award read:

> As a matter of law, the technical personnel performing drafting work at the Company's plant at

[1] The Company did transfer several members of the Engineers Union, which had a contract provision similar to Article 1, from its Great Neck, Long Island facility to Vallejo. As a result, the Company recognized that Union as the representative of both the assigned and newly hired engineers.

> Vallejo, California, are not under the coverage of the collective bargaining agreement with Local 445. However, they shall be governed by the wages and other terms of employment contained in the Local 445 Agreement (excluding the Union Shop and other representation clauses) and retroactive to June 5, 1970.

On May 3, 1971, the Union's president, Henry Zylla, wrote the Company, saying that the Union expected the award to be applied to all the Company's plants. In following weeks Zylla met with Company officials several times in an effort to enforce the award. The Company was told that the Union did not seek to represent the Vallejo workers, but rather was trying to protect the job security of the Long Island workers, which might be threatened if the Company continued to pay lower wages in California. Zylla also said that the Union interpreted the arbitrator's award as only setting a minimum for the California employees—the Company could pay them more if it desired.

On July 26 the Union filed a second grievance with the Company which alleged that the Company had failed to comply with Article 1 of the Agreement as interpreted by the arbitrator and which demanded that the Company comply with the award, recall the two Vallejo draftsmen who had been laid off in March by procedures allegedly improper under the contract, and make the two whole. One response of the Company was to file on August 2 the unfair labor practice charges that led to the instant case. The other was to deny the grievance after a meeting its labor relations supervisor had on August 11 with

Zylla and another union official. Zylla at this meeting listed the Union's demands relating to compliance with the award which dealt with wages; severance, vacation and sick pay; pension contributions; tuition refunds; overtime payments; the participation in a merit kitty; the recall of the two draftsmen; reimbursement of their medical expenses; and the reclassification of the drafting personnel wrongly classified. Following the Company's rejection on August 25, the Union proposed arbitration and an arbitrator was agreed upon, but the parties subsequently postponed the arbitration indefinitely.

Simultaneously with its efforts to enforce the arbitration, award, Local 445 also attempted to become the bargaining representative for the Vallejo employees. On May 10 it filed a representation petition with the Board's Region 20 in San Francisco. On July 8 the Regional Director ordered an election in a unit consisting of the draftsmen and two clerical employees, which the Union lost on August 5 by a vote of 2 to 0, with one vote being challenged.[2] The Union challenged this result and filed unfair labor practice charges against the Company alleging, *inter alia*, that the two draftsmen had been laid off because of their union activity. Following an investigation, the Regional Director dismissed the charges on September 14. He found that the lay offs had been caused by a lack of work and that when work subsequently became available the Company for business reasons had subcontracted it. On December 3 this dismissal was sustained by the General Counsel, and on December

[2] As mentioned earlier, two of the three draftsmen had been laid off. They were allowed to vote, subject to later challenge. Only one of them did. Since the two employees who did vote voted against the Union, the challenged vote was not counted.

16 the Regional Director overruled the Union's objections and certified the election results.

Meanwhile, Sperry on July 20 filed a petition in the New York County Supreme Court to modify the arbitrator's award insofar as it applied the New York City agreement to Vallejo, on the grounds that the award went beyond the only issue submitted to the arbitrator which was whether the agreement applied *in toto* to the California employees and that the Company's compliance with the award would violate the rights of the California employees. On November 2, Justice Amsterdam filed a decision granting the Company's petition on both grounds. 80 L. R. R. M. 2061. The Union appealed, but on its motion the Appellate Division postponed hearing the appeal until after the Board's decision in the instant case. Following that decision, the Appellate Division affirmed without opinion on June 19, 1973, 42 A. D. 2d 691, 345 N. Y. S. 2d 972, and on October 17, the Court of Appeals denied leave to appeal, 33 N. Y. 2d 517.

II.

The complaint before the Board charged that the Union's efforts to enforce the arbitration award after May 1, 1971 constituted the unfair labor practice of refusing to bargain collectively. After a hearing held on March 6, 1972, Trial Examiner[3] Paul Bisgyer handed down a decision on July 12, 1972 finding that the Union's activities aimed at enforcing the award were motivated by a desire to protect the job security of the Long Island employees and not by a desire to represent the Vallejo

[3] The title has since been changed to administrative law judge.

employees. He found nothing in the arbitrator's award or in the Union's actions that was repugnant to the National Labor Relations Act. He, therefore, recommended dismissal of the complaint.

Three members of the Board, Chairman Miller and Members Fanning and Jenkins, agreed with the trial examiner that the complaint should be dismissed. Although their opinion is not entirely clear, they apparently found that the object of Local 445's efforts in enforcing the award was preservation of the work of the New York City unit and not recognition as bargaining agent in California. They assumed that the arbitrator was correct in finding that the parties had voluntarily agreed to apply the terms of the New York agreement as minimum terms for employees doing similar work outside of the unit, which they said did not contravene the Act. Finally, they noted that none of Local 445's actions in securing enforcement of the award was "necessarily disruptive" of the bargaining relationship in New York.[4] Stated another way, the Board held that, if the Union's goal was not representation, the minimum wages and conditions of employment of the Vallejo employees were permissive subjects of bargaining in the New York City unit and that the Union's efforts at enforcing the award

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[4] The Company interprets the Board's holding as saying that irrespective of whether or not the Union was seeking to represent the Vallejo employees, there was no unfair labor practice since there was no disruption in the New York relationship between Company and Union. If this is what the Board held, it is clearly wrong. Demands by a union to represent employees outside the certified union are unfair labor practices even if no disruption occurs. See *Smith Steel Workers* v. *A. O. Smith Corp.*, 420 F. 2d 1 (7th Cir. 1969); *Douds* v. *International Longshoremen's Association*, 241 F. 2d 278 (2d Cir. 1957).

did not constitute bargaining to impasse. Such a result is necessary before there can be a failure to bargain in such circumstances. See generally *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U. S. 342 (1958).

Members Kennedy and Penello in dissent argued that the evidence established that the Union's efforts in securing the Company's compliance with the award were representational. They also argued that regardless of motive the Company could not agree with the representative of the New York City employees about the terms of employment of its California employees without violating the §7 rights of the California employees, 29 U. S. C. §157. For reasons that appear below, we agree with the Board's dissenters.

III.

In *Douds* v. *International Longshoremen's Association*, 241 F. 2d 278 (2d Cir. 1957), we upheld the district court's granting of a preliminary injunction sought by the Board against a union. In so doing, we held that a union fails to bargain in good faith when its demands over the company's objections a change in the bargaining unit so that it can represent other employees after the Board determines that the unit should remain unchanged. The Seventh Circuit in *Smith Steel Workers* v. *A. O. Smith Corp.*, 420 F. 2d 1 (7th Cir. 1969), enforced a Board order that held that a union failed to bargain when it continued to insist that it represented certain workers and sought arbitration of the issue after a Board decision that the workers were part of a unit represented by another union. The court held that following the Board's clarification order, the union had no right to employ

grievance procedures to overturn it. The thrust of both decisions is that after a valid Board decision of the appropriate bargaining unit under §9 of the Act, 29 U. S. C. §159, a union's attempt to represent workers outside that unit constitutes failure to bargain collectively. See also *Boire* v. *International Brotherhood of Teamsters*, 479 F. 2d 778 (5th Cir. 1973); *Local 7-210, OCAW* v. *Union Tank Car Co.*, 475 F. 2d 194 (7th Cir.), *cert. denied*,—U. S.— (1973).

We believe that *Douds* and *Smith* control the result here. First, it is clear that at all relevant times, all parties agreed that the Vallejo employees were a separate bargaining unit from the New York City unit. Several of the events at issue occurred after the Board validly ordered an election at a unit consisting only of the Vallejo draftsmen and clerical employees. And even before this order the union did not claim that the Vallejo employees were an accretion to the New York City unit, which the Board certified in 1962. See generally Melbet Jewelry Co., 180 N. L. R. B. 107 (1969); Supermarkets General Corp., 170 N. L. R. B. 446 (1968), enforced sub nom. Local 919, *Retail Clerk's* v. *NLRB*, 416 F. 2d 1118 (D. C. Cir. 1969).

Second, the Board's finding that the Union's efforts were motivated by a desire to protect the job security of the Long Island employees and not by a desire to represent the Vallejo employees was not supported by substantial evidence. See *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951). The Union's efforts to secure the reinstatement of the two draftsmen who had been laid off in March 1971 is utterly inconsistent with the Union's alleged purpose of protecting the job security

of the New York City unit employees.[5] Moreover, it is difficult to see how the Union at the times relevant to the charges here could have believed that the Vallejo unit affected the job security of the New York City unit. At the hearing before the trial examiner, Zylla made the unsubstantiated claim that the Company in the fall of 1970 was planning to expand the Vallejo facility, but by March 1971 it was clear that the Company was contracting the unit. Only one draftsman was employed there after that date. It strain credulity to believe that the Union honestly believed that its New York City unit consisting of a large number of employees was significantly threatened by a single draftsman working for lower wages almost three thousand miles away. The only reasonable conclusion is that the Union was seeking to represent the Vallejo employees through both the representation election in California and the grievance procedures in New York.

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[5] The Board's majority described the Union's efforts at arbitrating the validity of the layoffs as merely an attempt to discuss whether its objections to them were representational or were related to the economic benefits given the California employees. There is, however, no evidence that the Union was seeking reinstatement of the two draftsmen only if their economic benefits affected the New York City unit. The Board's attempt in its brief to label the reinstatement demand as being merely "inadvertent" is similarly unpersuasive. Most of the second sentence of the two-sentence grievance filed on July 26 dealt with this issue.

The trial examiner argued in his opinion that the reinstatement demand was consistent with the Union's efforts to win the representational election in California, and was, therefore, proper. Certainly the demand was consistent with the Union's desire to win the election, but the issue here is what was the Union's dominant motive in employing the grievance procedure of the New York agreement. The reinstatement demand shows that its was to represent the employees in California.

Thus, the Union's activities in enforcing the award must be characterized as a *sub rosa* attempt to gain the *de facto* recognition as bargaining agent of the Vallejo employees which it might not and did not gain in the election. The rationale of *Douds* and *Smith* prohibits unions from engaging in covert attempts to subvert the Board's orders regarding the proper bargaining unit as well as the overt attempts at issue there.

IV.

We also hold that, regardless of the Union's motive in seeking enforcement of the arbitration award, it committed an unfair labor practice because the subject of the wages and working conditions of the Vallejo employees was not a permissible subject of bargaining in the New York City unit. Section 7 of the Act guarantees employees the right to organize and bargain collectively and the right to refrain from such activities. Generally, an employer commits the unfair labor practices of interfering with employees' §7 rights and supporting a union in violation of §§8(a)(1) and (a)(2) when it imposes on employees of one unit the contract and bargaining agent of another unit. See, e.g., *Sheraton-Kauai Corp.* v. *NLRB*, 429 F. 2d 1352 (9th Cir. 1970); *Welch Scientific Co.* v. *NLRB*, 340 F. 2d 199 (2d Cir. 1965).

The Board's majority held that no provision of the Act was violated when parties voluntarily agree that the terms of their collective bargaining agreement will be the minimum terms of employment for the employer's employees not in the bargaining unit if the purpose of the agreement is to protect the job security and wage structure of the employees within the unit. This ruling, how-

ever, raises the possibility of serious infringements on the rights of those employees outside the unit, especially where, as is the case here, there is no evidence that the job security of workers in the unit may be affected. The interests of employees within and without the unit might conflict at several points. For example, the workers outside the unit might wish to accept lower wages in return for more jobs.

Requiring them to accept as a minimum the higher wages of other employees' collective bargaining agreement may thwart their desires. This difficulty is compounded when, as happened here, the union insists that minimum terms for the workers outside its unit match the terms of its agreement down to such minutiae as tuition refunds. The workers outside the unit, either individually or collectively, might have differing economic priorities, such as preferring take-home pay to fringe benefits, even though the total cost to the employer of their demands be the same.

In support of its holding, the Board cites *Local 24, Teamsters* v. *Oliver*, 358 U. S. 283 (1959). In that case the Court held that a state could not hold a portion of a multi-employer collective bargaining agreement illegal under its antitrust law since the matter was a mandatory subject of bargaining under the National Labor Relations Act. The agreement between the carriers and their truck drivers required that when trucks rented by the carriers were driven by their owners the owner-drivers must be paid the wages provided in the carriers' agreement with the drivers and a certain minimum rental for the trucks. The record indicated that the minimum rental was the estimated cost to the truck owner of the trip

and was negotiated in response to the practice of the carriers negotiating rentals that were below the owner-drivers' costs. The owner-drivers were in effect accepting lower wages than the agreement called for. The Court in *Oliver* held that the minimum rental paid to the owner-drivers was a mandatory subject of bargaining between the carriers and their drivers since it represented "a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining agreement." 358 U. S. at 294.

Oliver's holding that the terms of employment of those outside the unit can be mandatory subjects of bargaining has been limited to situations in which those terms "vitally affect" the unit employees. *Chemical Workers, Local 1* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 179 (1971). A balancing of the interests of the employees inside and outside the bargaining unit requires, we believe, that bargaining over the terms of employment of workers outside the unit be likewise limited. Even though in an interdependent economy the wages of one group of workers potentially might affect the wages of all other workers, an employer generally cannot bargain with a union over the wages that the union will negotiate with other employers, see *United Mine Workers* v. *Pennington*, 381 U. S. 657 (1965),[6] nor can a union bargain with an employer over the wages that the company will negotiate with its other employees absent evidence that the other employees' wage vitally affect the terms of

[6] The Board has held that an employer may insist upon a "most favored nation" clause in an agreement. Dolly Madison Industries, Inc., 182 N. L. R. B. 1037 (1970).

employment of the workers the union represents.[7] As noted above, there is no evidence that the terms of employment at the Vallejo unit affected the New York City unit. Therefore, the Company could not have complied with the arbitrators' award without infringing upon the rights of the Vallejo employees in violation of §§8(a)(1) and (a)(2) of the Act, and the Union's attempt to require it do so constitutes a failure to bargain collectively in violation of §8(b)(3) of the Act.[8]

Accordingly, the Company's petition is granted, the Board's order is vacated, and the case is remanded for further proceedings consistent with this opinion.

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[7] This is not a situation in which a collective bargaining agreement requires that certain work be done by workers in the unit even though workers outside the unit may be affected. See *National Woodwork Manufacturers Association* v. *NLRB*, 386 U. S. 612 (1967); *Local 24, Teamsters* v. *Oliver*, 362 U. S. 605 (1960) (Oliver II). Cf. *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203 (1964). Here the Union is attempting to set the minimum terms of employment for workers outside the unit.

[8] It is no defense that the arbitrator determined that the New York City agreement applied to the Vallejo unit, because his award was repugnant to the Act. See Pix Manufacturing Co., 181 N. L. R. B. 88 (1970). See generally Ryder Technical Institute, 199 N. L. R. B. No. 85 (1972); Collyer Insulated Wire, 192 N. L. R. B. No. 150 (1971).

Appendix B, Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of February, one thousand nine hundred and seventy-four.

Present:

HON. JOHN A. DANAHER,
HON. J. EDWARD LUMBARD,
HON. WILLIAM H. TIMBERS,
Circuit Judges.

73-1621

SPERRY SYSTEMS MANAGEMENT DIVISION,
SPERRY RAND CORPORATION, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

LOCAL 445, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Intervenor.

Appendix B

A petition to review an order of the National Labor Relations Board.

This cause came on to be heard on the certified list of items comprising the record from the National Labor Relations Board and was argued by counsel.

On consideration thereof, it is now hereby ordered, adjudged and decreed that the order of the National Labor Relations Board be and it hereby is vacated and that the action be and it hereby is remanded to the said Board for further proceedings consistent with the opinion of this court with costs to be taxed against the respondent.

A. DANIEL FUSARO
Clerk

By: VINCENT A. CARLIN
Chief Deputy Clerk

Appendix C, Decision and Order of National Labor Relations Board

D—7238

202 NLRB No. 18 Great Neck, L.I., N.Y.

DECISION AND ORDER ISSUED BY THE NATIONAL LABOR RELATIONS BOARD dated March 5, 1973

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 29—CB—1019

LOCAL 445, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO

and

SPERRY SYSTEMS MANAGEMENT DIVISION, SPERRY RAND CORPORATION

DECISION AND ORDER

On July 12, 1972, Admniistrative Law Judge[1] Paul Bisgyer issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs. The Respondent filed a brief in support of the Decision. On September 11, 1972, oral argument was heard.

[1] The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

Appendix C

The Board has considered the record and the attached Decision in light of the exceptions, briefs, and oral argument and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge to the extent consistent herewith and to adopt his recommended Order.

Respondent Union is the exclusive bargaining representative in a unit of technical employees in the metropolitan area of New York City employed by Sperry Systems Management Division, Sperry Rand Corporation (hereinafter called the Company).

Article I of the collective-bargaining agreement in effect at all times relevant hereto reads as follows:

> This Agreement shall apply to all plants now operated by the Employer, its successors or assigns, wherever situated. In the event any nonsupervisory (except engineers) employees within the IUE bargaining units of the Company are transferred to a location other than a plant now operated by the Company, any additional personnel hired at such location to work with such transferred employees in bargaining unit jobs, as hereinafter described, shall be covered by the terms of this Agreement.

In the spring of 1970, while this agreement was in effect, the Company commenced operations in a new facility in Vallejo, California, where it employed, among others, three individuals who performed the same type of drafting work as that done by technical employees in the New York bargaining unit. No technical employee in the contract unit, however, was transferred to the Vallejo facility.

Appendix C

The Union became aware that drafting work was being performed at Vallejo and from its own investigation concluded that certain employees at Vallejo were classified under different job titles than New York draftsmen and that they were being paid lower wage rates and other economic benefits than the New York employees for performing essentially the same work. The Union also learned that the Company was contemplating some further expansion of the Vallejo operation.

The Respondent Union thereupon filed a grievance under the New York contract claiming a violation of the above-quoted article I. The Company denied the grievance on the ground that no nonsupervisory employees within the New York unit had been transferred to Vallejo and thus asserted that the clause had no application to the Vallejo facility. The grievance was subsequently submitted to arbitration.

The arbitrator held that there was insufficient evidence to warrant a finding that the Vallejo facility was an accretion to the New York unit and that it was thus improper to direct the Company to apply the New York contract to the technical personnel at Vallejo, since such a ruling would require the Company to commit an unfair labor practice. On the other hand, he concluded that it was his obligation to require compliance with article I of the New York contract "to the extent that it would be legal to apply the contract terms agreed upon by the parties." He therefore held that article I should be applied

> to the extent that the technical personnel performing drafting work at the Vallejo plant shall be governed by the same wages and other terms of employment as set forth in the Local 445 Agreement

(but excluding any union shop or representation clauses), retroactive to June 5, 1970.

Thereafter, Respondent attempted to secure compliance with the award, explaining that under its view of the award, the Company was not precluded from granting Vallejo employees better wages or terms of employment than those applicable in the New York unit, but that it would object to the Company's paying employees in Vallejo lower rates and benefits than those applicable in New York. The Respondent explained that the purpose of such union objections was to preserve job opportunities in the New York unit and to discourage the hiring of new employees at lower rates in Vallejo to perform the same type of work being done in New York.

At about this same time, Respondent attempted to organize the clerical and drafting employees. The attempt failed when a majority of the Vallejo employees voted against union representation in an NLRB election. At various times, the Union demanded that certain specific action should be taken in compliance with the Respondent's understanding of the arbitration award, including requesting that a Vallejo technician be reimbursed for certain tuition expenses in the manner specified by the New York contract, that certain Vallejo employees be reclassified to conform to the New York contract classifications and their pay scales be adjusted accordingly, and that certain employees laid off at Vallejo be recalled (Respondent asserting that they had been improperly laid off under the contract). Certain other requests were also made which, in general, would have required the Company to conform Vallejo wages, severance, vacation, sick pay, pension contributions, overtime payments, and

the like, to the New York agreement's terms. Respondent ultimately filed a comprehensive grievance relating to these matters and requested arbitration when the grievance was denied.

The Company denied all of the demands and grievances of the Union relating to the Vallejo employees and also filed a legal proceeding in the New York courts protesting the arbitration award and seeking to have it modified. It met with at least initial success in this proceeding, in that the trial court held that the arbitrator had both exceeded the scope of his authority and had directed a remedy which would cause the Company to violate the National Labor Relations Act. The trial court's decision is now on appeal and any decision of the appellate court has been stayed pending the outcome of the instant proceeding before this Board.

Meanwhile, Respondent has continued to pursue its demands that the Company comply with the arbitration award and also filed the grievance above mentioned which it has sought to arbitrate. The Company has denied all of Respondent's requests and grievances arising out of the arbitration award and has filed the charge herein, claiming that Respondent's demands with respect to Vallejo employees violated Section 8(b)(3) of our Act.

General Counsel asserts that the Union's attempts to secure compliance with the arbitration award, including its filing of grievances relating to Vallejo employees, violate Section 8(b)(3) of the Act. General Counsel further contends that the Respondent's persistent demands that the Company honor the award and the Respondent's submission of the Company's noncompliance to the contractual grievance arbitration procedures constituted attempts to

secure recognition and to bargain as the exclusive representative of the Vallejo technicians in an enlarged inappropriate unit resulting from the addition of those employees to the previously certified contract unit. General Counsel has not specifically attacked the validity of the arbitration award but the Company argues that the award itself is in irreconcilable conflict with our Act. In support of their position, both the General Counsel and the Company rely principally on *Smith Steel Workers Directly Affiliated Labor Union 19806, AFL-CIO (A. O. Smith Corporation)*, 174 NLRB 235, enfd. in part *sub nom. Smith Steel Workers* v. *A. O. Smith*, 420 F.2d 1 (C.A. 7).

Respondent contends that its actions were not intended to achieve unlawful recognition, but rather were taken in furtherance of Respondent's legitimate interests to preserve job opportunities for New York employees by preventing the Company from establishing plants with inferior terms and conditions of employment to which drafting work could be diverted from New York.

The Administrative Law Judge recommended that the complaint be dismissed, finding that the charge of unlawful refusal to bargain was unsubstantiated by the evidence. He held that Respondent had merely pursued peaceful and orderly means to prevent what it reasonably regarded as company action which could result in a diversion of unit work from a New York plant to the lower paying Vallejo facility. He found Respondent's interests in such matters legitimate in that it related to the preservation of unit work. He further found that the arbitration award was not repugnant to the policies of the Act in that it neither required nor permitted the Company to recognize Respondent in the Vallejo unit and required the Company only

to do what it legally could do—i.e., extend to unrepresented employees the same wage rates and other benefits which a labor organization had obtained for the employees it represented.

He distinguished the *Smith Steel Workers* case, noting that in that case the Union had openly insisted on recognition rights in a unit in which this Board had found that another labor organization had recognition rights. Since he did not here find any recognitional objectives in the Union's action, he found the *Smith* case inapplicable.

We agree with the result reached by the Administrative Law Judge, essentially for the reasons stated in his opinion. We note particularly that Respondent took no action here which we would regard as necessarily disruptive of the bargaining relationship in the New York unit. This is not a case in which negotiations in the New York unit were impeded by either insistence during New York negotiations to the point of impasse that the Company take action relating to Vallejo employees nor by taking of economic action in support of any such demands.

Nor are we willing to construe an arbitration award which, by its specific terms, refuses to confer any representational rights with respect to Vallejo employees upon Respondent as having a contrary meaning or necessary implication. We do not pass upon whether that award was a correct interpretation of the parties' New York agreement nor do we pass upon the issue of whether the award may have exceeded the scope of the issues submitted to him. We must, however, assume, unless and until a court of last resort should decide to the contrary, that the arbitrator was correct in finding, in essence, that the New York agreement constituted a voluntary agreement be-

tween the parties that employees may not be engaged by the Company at non-New York locations to perform the same duties as those performed by New York employees at lesser pay rates and other economic benefits. We cannot say that such a voluntary agreement either contravenes basic statutory policy nor that it necessarily confers representational rights for non-New York employees upon Respondent. If such an agreement is lawful and the arbitrator is correct in holding that the parties have so agreed, we can perceive no violation of Section 8(b)(3) in the Union's attempts to secure compliance with such an agreement through peaceful and orderly means.

Certain of the Union's actions, including particularly its demands with respect to the layoff of three employees at the Vallejo facility, may well appear at first glance at least to have representational overtones.[2] We are unwilling to say that the Union's attempt to discuss, or to have arbitrated, the issue of whether its objections to the layoff relate to economic benefits or are representational, and thus precluded from coverage by the award, rises to the level of a violation of Section 8(b)(3). Here again we note that there is no evidence that the Union's attempt to resolve the application of the award to Respondent's claims as to the layoff through peaceful and orderly means would have disrupted the ongoing bargaining relationship in the New York unit. Nor was any economic action taken or threatened in support of this union demand which might have had an adverse effect upon the New

[2] We do not deem it necessary to reach the question of whether or not the Administrative Law Judge was correct in discounting the arguably representational nature of this demand as being merely an attempt to win employee support in the Vallejo election.

York bargaining relationship. In fact, it would seem that any contrary ruling by this Board would improperly interfere with Respondent's right to seek an orderly and peaceful determination of its contractual rights.

Accordingly, in agreement with the Administrative Law Judge, we will dismiss the complaint in its entirety.

Dated, Washington, D.C.
Mar. 5, 1973

.....
Edward B. Miller, Chairman

.....
John H. Fanning, Member

.....
Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBERS KENNEDY AND PENELLO, dissenting:

Unlike our colleagues, we find that Respondent violated Section 8(b)(3) of the Act by using the collective-bargaining process established for a unit of New York employees to determine the wages, hours, and working conditions of employees in California, whom it concededly did not represent.

The Respondent here claimed that its bargaining position on the application of the New York contract was justified

because (1) an arbitrator determined that all terms of the New York contract, excluding the union shop and other representational terms, should be applied to the California employees; and (2) its objective was to preserve work opportunities for the employees in New York. We find no merit in these defenses for the following reasons.

The arbitrator's award was repugnant to the purposes and policies of the Act [3] because it was contrary to established Board and court decisions.[4] According to well-recognized Board principles, a contract cannot lawfully be applied to employees outside the established unit unless they constitute an accretion to that unit.[5] The award here fails to accord with that principle, even though the union shop and other recognitional terms were excised. In *International Ladies' Garment Workers' Union, AFL-CIO [Bernhard-Altmann Texas Corp.]* v. *N.L.R.B.*,[6] the Supreme Court held that a contract that resulted from bargaining with a minority representative was completely void and could not be applied even as a members-only contract. An employer cannot bargain collectively with a nonrepresentative union as though it were an exclusive representative. The effect of this award is to require the Company to bargain collectively with the Union concerning the wages, hours, and working conditions of the California employees and to allow the Respondent to administer the application of the contract on behalf of the California

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[3] Cf. *Spielberg Manufacturing Company*, 112 NLRB 1080.

[4] *Radio Television Technical School, Inc. t/a Ryder Technical Institute*, 199 NLRB No. 85.

[5] *Super Markets General Corporation d/b/a Shop-Rite*, 170 NLRB 446.

[6] 366 U.S. 731.

employees. In short, it requires the Company to deal with the Respondent as though it were the exclusive representative of these employees, even though it does not require formal recognition. This result seriously infringes on the Section 7 rights of the California employees and is contrary to the purposes and policies of the Act.

The Respondent's contention that its objective was to preserve job opportunities for the New York employees is not established by the evidence. The evidence shows that no work was diverted from New York to California. The Respondent's demands were not limited to those economic features of the contract which are reasonably related to a work preservation objective. In this regard we note, that the second grievance filed by Respondent reads as follows:

> The Employer has violated Article I of the Agreement as ruled upon by the Arbitrator Benjamin Roberts.
>
> The Union demands that the Employer comply with the arbitrator's award, recall the drafting personnel laid off at Vallejo, California and make them whole.[7]

This second grievance was patently unrelated to any work preservation objective with respect to the New York unit. It is only relevant to establish conclusively that the work preservation argument was a smokescreen to conceal the Respondent's true objective—recognition.

Although we are persuaded that the objective of the Respondent's demands was to secure recognition, we would find a violation of Section 8(b)(3) even if the Respond-

[7] G.C. Exh. 13.

ent's sole objective was work preservation. Motivation is not controlling because the rights sought to be exercised are representational in nature and reserved for the exclusive representative of the California employees, when and if such a representative is selected. Absent the status of exclusive representative of these employees, the Respondent has no right to participate in the determination of their wages, hours, and working conditions. The fact that these employees have chosen not to be represented by the Respondent makes it clear that the Employer could not lawfully bargain with the Respondent about their wages, hours, and other terms and conditions of employment. Even though an employer may voluntarily accord unrepresented employees the same benefits as represented employees, an employer may not bind itself to do so by agreement with a union.[8]

In essence, the Respondent insistently used its collective-bargaining status as the representative of the New York unit employees to make demands which the Company could not honor without violating Section 8(a)(2) of the Act. Unlike our colleagues, we will not presume that these demands had no impact on the bargaining relationship established for the New York unit simply because there was no extrinsic evidence of damage. Insisting on unlawful demands for agreement through collective bargaining is inherently destructive of that process. Such an abuse of the collective-bargaining process is wholly inconsistent with the obligations imposed upon unions by Section 8(b)(3). The Board so recognized in *Smith Steel Workers*,[9] a case

[8] Cf., *United Mine Workers of America* v. *Pennington*, 381 U.S. 657; *Dolly Madison Industries, Inc., Richmond Dairy Division*, 182 NLRB 1037.

[9] 174 NLRB 235, enfd. as modified 420 F. 2d 1 (C.A. 7, 1969).

we view as indistinguishable from that before us here. In *Smith Steel Workers*, the Board found that a union's insistent demands for the application of a contract to employees previously determined by the Board to be outside the unit violated Section 8(b)(3). Here, some of Respondent's demands followed the Board's certification of the results of an election in California, in which the Board determined that those emloyees composed a separate appropriate unit and chose not to be represented by Respondent. Plainly, therefore, the Respondent, in pressing its demands thereafter, was acting in direct contradiction of a Board determination. The fact that no other union was involved in this case cannot serve as a distinction. Section 7 guarantees employees the right to refrain from union representation. This right should be given no less weight than the corresponding right to select union representation. For all these reasons, we cannot escape the conclusion that Respondent violated Section 8(b)(3) as alleged.

Mar 5 1973

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Ralph E. Kennedy, Member

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John A. Penello, Member

Appendix C

ORDER CORRECTING DECISION AND ORDER

dated March 7, 1973

Great Neck, L.I., N. Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 29-CB-1019

LOCAL 445, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO

and

SPERRY SYSTEMS MANAGEMENT DIVISION, SPERRY RAND CORPORATION

ORDER CORRECTING DECISION AND ORDER

On March 5, 1973, the National Labor Relations Board issued a Decision and Order [1] in the above-entitled proceeding in which there is an inadvertent error.

IT IS HEREBY ORDERED that said Decision and Order be, and it hereby is, corrected by inserting the word "not" between the words "could" and "honor" in the third line of the second paragraph, on page 11.

IT IS FURTHER ORDERED that the Decision and Order, as printed, shall appear as hereby corrected.

Dated, Washington, D. C., March 7, 1973.

By direction of the Board:

HOWARD F. LEBARON
Associate Executive Secretary

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[1] 202 NLRB No. 18.

Appendix D, Decision of Administrative Law Judge

TXD-402-72
Great Neck, L.I., N.Y.

ADMINISTRATIVE LAW JUDGE'S DECISION
(formerly Trial Examiner) issued July 12, 1972

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

Case No. 29-CB-1019

LOCAL 445, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO

and

SPERRY SYSTEMS MANAGEMENT DIVISION, SPERRY RAND CORPORATION

ANTHONY A. AMBROSIO, ESQ.,
for the General Counsel.

VLADECK, ELIAS, VLADECK & LEWIS,
by SYLVAN H. ELIAS, ESQ., of New
York, N.Y., for the Respondent.

POLETTI FREIDIN PRASHKER FELDMAN &
GARTNER, by ERIC ROSENFELD, ESQ., of New
York, N.Y., for the Charging Party.

Appendix D

TRIAL EXAMINER'S DECISION

Statement of the Case

PAUL BISGYER, Trial Examiner: This proceeding, with all parties represented, was heard on March 6, 1972, in Brooklyn, New York, on the complaint of the General Counsel, issued on December 27, 1971 [1] and the answer of Local 445, International Union of Electrical, Radio and Machine Workers, AFL-CIO, herein called the Respondent or Union. The issue litigated is whether the Respondent, in violation of Section 8(b)(3) of the National Labor Relations Act, as amended,[2] refused to bargain collectively with Sperry Systems Management Division, Sperry Rand Corporation, herein called the Company, in an appropriate unit by insisting that the Company honor an arbitration award and apply their bargaining contract covering the technical employees at the Company's Metropolitan New York City plants, except for the union shop and representation provisions, to certain unrepresented technical employee's at the Company's Vallejo, California, facility. At the close of the hearing, the General Counsel and the Respondent made a short oral presentation of their positions. Thereafter, all the parties filed briefs.

Upon the entire record, and from my observation of the demeanor of the witnesses, and with due consideration

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[1] The complaint is based on original and amended charges filed on August 2 and 26, 1971, respectively, copies of which were duly served on the Respondent by registered mail on the respective filing dates.

[2] Section 8(b)(3) makes it an unfair labor practice for a labor organization or its agents "to refuse to bargain collectively with an employer, provided it is the representative of his employees" designated by a majority of them in an appropriate unit.

being given to the arguments advanced by the parties, I make the following:

Findings and Conclusions

I. The Business of the Company

The Company, a Delaware corporation with its principal office and place of business in Great Neck, New York, operates plants in different states in the United States where it is engaged, for national defense and civilian purposes, in the research, development, manufacture, sales, distribution and servicing of electronic systems and instruments, navigation devices and related products. In the regular course of its business, the Company annually purchases goods and materials valued in excess of $1,000,000 which are shipped in interstate commerce directly to its various facilities. It also annually ships from these plants finished products valued in excess of $1,000,000 directly to destinations in states outside the place of manufacture.

It is admitted, and I find, that the Company is an employer engaged in commerce within the meaninging of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

There is no question, and I find, that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Introduction*

In essence, the Respondent is charged with unlawfully refusing to bargain with the Company because, in accord-

ance with an arbitrator's award, it insisted that the Company extend the wages, benefits and other nonrecognitional provisions of their contract covering a Metropolitan New York City technical unit to certain unrepresented technical employees in Vallejo, California, who performed the same type of work done by drafting employees in the contract unit. As will be detailed below, the Respondent's alleged unlawful conduct consisted of oral and written demands, both general and specific in nature, made subsequent to the arbitration award, culminating in the filing of a new grievance and the institution of a second arbitration proceeding. It is the theory of the complaint that the Respondent, by its actions, was actually seeking to add the Vallejo employees in question to the contract unit and thereby to bargain for them in an appropriate unit in violation of Section 8(b)(3) of the Act.

B. *The Evidence*

1. Bargaining history; the Vallejo, California operation; the filing of a grievance

Since its certification on June 6, 1962, the Respondent has been the exclusive bargaining representative of the Company's employees in a so-called Metropolitan New York City technical unit,[3] pursuant to successive agree-

[3] Case No. 2-RM-1199. At that time and until 1967 the employer was known as Sperry Gyroscope Company, Division of Sperry Rand Corporation. In 1967, the operation became a function of Sperry Systems Management Division, Sperry Rand Corporation. Specifically, the certified unit consists of:

(footnote continued on next page)

ments. The last agreement became effective on June 5, 1970 for a period expiring on August 15, 1973. Involved in the events discussed below is Article 1 of the current agreement [4] which provides:

> This Agreement shall apply to all plants now operated by the Employer, its successors or assigns, wherever situated. In the event any nonsupervisory (except engineers) employees within the IUE bargaining units of the Company are transferred to a location other than a plant now operated by the Company, any additional personnel hired at such location to work with such transferred employees in bargaining unit jobs, as hereinafter described, shall be covered by the terms of this Agreement.

(footnote continued from previous page)

All draftsmen, engineering aides, industrial illustrators, materials lab assistants *I* and *II*, materials test coordinators, parts catalog writers *I* and *II*, senior draftsmen, senior draftsmen trainees, senior industrial illustrators, technical illustrators, writers *I* and *II* and *IV*, development technicians and engineering politan New York City including Nassau and Suffolk employed at the Company's plants in metro- Counties; on temporary assignments wherever located from said plants; and on temporary or permanent assignments from said plants to customer or vendor installations, wherever located; exclusive of all guards, watchmen, professional employees and supervisors as defined in the Act and all other employees not employed in the included classifications.

The certification was issued in the name of Engineers Association, International Union of Electrical, Radio and Machine Workers, Local 445, AFL-CIO.

[4] This provision first appeared in the parties' contract executed in June 1964 and was continued in their subsequent contracts. Moreover, this provision has similarly been incorporated in almost identical language in the Company's contracts with sister locals of the Respondent covering other bargaining units.

Appendix D

In the spring of 1970, the Company commenced operations in a new facility in Vallejo, California, where it employed, among others, three individuals who performed the same type of drafting work as that done by technical employees at the Company's Great Neck plants belonging to the Metropolitan New York City unit. However, no technical employee in the contract unit was transferred to the Vallejo facility so that concededly no rights accrued to the Respondent by reason of the second sentence of Article 1.[3] In early fall, the Union became aware that drafting work was being performed at the Vallejo facility. Upon investigating the matter, the Union learned that the three employees were not given conventional draftsman titles but that one was classified senior technical assistant and the other two were classified as technical assistants. It was further ascertained that these technicians were paid less than draftsmen in comparable classifications in the Metropolitan New York City technical unit; that they were not receiving the same wages and other economic benefits; and that the Company was contemplating an expansion of the Vallejo operation.

Fearing that this situation could have an adverse impact on the draftsmen's job opportunities at the Great Neck plants, the Respondent on November 27, 1970 filed with the Company a grievance (No. 14-70) pursuant to

[3] The Company, however, assigned from the Great Neck plant to the Vallejo facility several engineers who were represented by the Engineers Union, a sister local of the Respondent, under a separate contract which contained substantially the same Article 1. As a result, the Company, in accordance with that provision, recognized the Engineers Union as the bargaining representative of the assigned and newly hired engineers at Vallejo and applied the terms of their New York contract to all of these employees.

the terms of the parties' current agreement.[6] The grievance charged that

> The Company has violated Article I of the Labor Agreement by its failure to apply the Agreement to the technical personnel doing drafting work at Vallejo, California. The Union demands that the Agreement be applied to them and that they be made whole.

Thereafter, several meetings were held between the Respondent and the Company at which the Company, in disagreement with the Union, took the position that Article 1 was inapplicable to the Vallejo technicians apparently for the reason that no Metropolitan New York City technical unit employees had been transferred to that facility. Accordingly, on December 11, 1970, the Company formally denied the grievance.

2. The arbitration proceeding and award

Upon receipt of the Company's rejection of its grievance, the Respondent promptly proceeded to arbitration in conformity with contractual procedures.[7] On Febru-

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[6] Article 26 provides for a formal two-step grievance procedure culminating in binding arbitration for the settlement of "[a]ll disputes, differences, or grievances that may arise between the Union and the Employer, or between the Employer and the Union. . . ."

[7] Insofar as pertinent, Article 26(F), entitled "Arbitration," reads, as follows:

> 1. . . . all disputes, differences and grievances which may arise out of this Agreement including claims arising out of breaches or threatened breaches or violations or threatened violations of this Agreement and which shall not have been satisfactorily settled within two weeks following the procedure herein set forth shall, at the request of either party, be promptly submitted to arbitration. Arbitration shall be the sole and exclusive remedy available to the parties hereto. . . . The decision of the arbitrator shall be final and binding upon all parties and shall be complied with promptly.

ary 22, 1971,[8] a hearing was held before Arbitrator Benjamin C. Roberts. The specific question presented to him was "[w]hether the technical personnel performing drafting work at Vallejo, California, are under the coverage of the collective bargaining agreement with Local 445." On April 19, the arbitrator issued a 22-page Opinion and Award in which he discussed the genesis of the first sentence in Article 1 quoted above,[9] which concededly is the only part here relevant; the bargaining history; Board law respecting the accretion of new plants to established bargaining units; and the many contentions advanced by the parties. The arbitrator interpreted Article 1 as requiring the application of the current contract to the Vallejo facility as it was a plant in operation on June 5, 1970, the effective date of the contract. However, he determined that, since there was insufficient evidence to warrant a finding that Vallejo was an accretion to the Metropolitan New York City technical unit within the meaning of Board decisions, it would be beyond his duty and responsibilities to direct the Company to apply the entire contract to the technical personnel who performed drafting work at the Vallejo plant and thereby require the Company to commit an unfair labor practice. On the other hand, he concluded that it was his

> obligation . . . to require compliance to the extent that it would be legal to apply the contract terms agreed upon by the parties, and particularly since there is such identity in the work being done in Vallejo and at . . . [the Great Neck plants]. Con-

[8] Unless otherwise indicated, all dates refer to 1971.

[9] I.e., "This Agreement shall apply to all plants now operated by the Employer,—wherever situated."

sequently, as the alternative to the enforcement of the Agreement in whole, the Company should be required to enforce Article I to the extent that the technical personnel performing drafting work at the Vallejo plant shall be governed by the same wages and other terms of employment as set forth in the Local 445 Agreement (but excluding any Union shop or representation clauses), retroactive to June 5, 1970.

Accordingly, the arbitrator issued the following

AWARD

As a matter of law, the technical personnel performing drafting work at the Company's plant at Vallejo, California, are not under the coverage of the collective bargaining agreement with Local 445. However, they shall be governed by the wages and other terms of employment contained in the Local 445 Agreement (excluding the Union Shop and other representation clauses) and retroactive to June 5, 1970.

3. The Respondent's unsuccessful efforts to secure compliance with the award; its institution of further grievance and arbitration proceedings

On May 3, the Respondent's president, Henry Zylla, notified the Company that the Union expected it to apply the arbitrator's award to all of its plants in existence on June 5, 1970. On May 5, the Company's labor relations supervisor, Joseph Schmidt, simply responded that the award, by its terms, applied only to the Vallejo plant. In the ensuing weeks, Zylla had several meetings with Gus

Kolmel, the Company's labor relations manager, and Schmidt in an effort to secure compliance with the award. As indicated above, this required that the wages and other terms and conditions of employment of the Vallejo technicians engaged in drafting work at least be equalized with those prescribed in the New York contract for drafting employees and prevailing in the Great Neck plants. The Company was also informed that the award, however, did not preclude the Vallejo employees from seeking or being given better terms of employment. In one such meeting with Kolmel, Zylla explained that, in requesting the Company to implement the award, the Union was not undertaking to represent the Vallejo technicians but rather was acting on behalf of the Great Neck draftsmen covered by the New York contract. He testified, in effect, that the underlying motivation for the Union's actions was to preserve job opportunities in the Great Neck plants and to discourage the hiring of new employees in Vallejo to perform the same type of work being done in Great Neck. On this occasion, Zylla also requested reimbursement of tuition expenses incurred by a Vallejo technician (Judith Eskew), as required by the New York contract and the award.[10] Kolmel stated that he would look into the matter and asked Zylla to send him the receipts.

On May 27, Zylla wrote Kolmel a letter in which he enclosed the previously requested receipts of tuition expenses. In addition, the letter reminded Kolmel that

> [on] a number of occasions the union has attempted to resolve the differences which exist as

[10] According to Zylla's undisputed testimony, unrepresented employees also enjoyed this benefit where the courses related to their work.

a result of the arbitrator's award in Grievance No. 14-70. We are particularly disturbed by the company's delay in carrying out the arbitrator's decision. As I pointed out at one of our meetings, the union position is that all three of the drafting people in California should have been properly classified as design draftsmen. Their back pay should be based on that classification.

* * *

In our opinion the company should prepare a separate itemized accounting for each of the three people involved in this arbitration. This accounting should be forwarded to the union as soon as possible so that we may review it and determine whether or not the company has fully complied with the arbitrator's award.

On or about July 26, the subject of the arbitration award fortuitously came up during the course of a union-management meeting which was called to consider unrelated problems. At one point, the Company's director of industrial relations, Gerald Weiner, remarked to Zylla that the Vallejo technical employees had "quite a deal; these people can't get less, according—[to the Union], but they can get more. That's a great deal." Zylla agreed that that was the effect of the award.

Failing to persuade the Company to comply with the arbitrator's award, the Respondent on July 26 filed with the Company another grievance, alleging as follows:

> The Employer has violated Article I of the Agreement as ruled upon by Arbitrator Benjamin Roberts.

Appendix D

> The Union demands that the Employer comply with the arbitrator's award, recall the drafting personnel laid off at Vallejo, California, and make them whole.

The Company responded by filing on August 2 the unfair labor practice charge which initiated the present proceedings.

Thereafter, pursuant to prior arrangement, Zylla and Russ Mantione, the chairman of the Respondent's grievance committee, conferred with Labor Relations Supervisor Schmidt on August 11 concerning the above grievance. In the 10 minutes or so that the meeting lasted, Zylla complained that the Company was not honoring the award, as their New York contract obligated it to do, by applying that contract to the Vallejo technical employees here involved. He then proceeded to list the Union's demands, compliance with which he regarded was required by the award. These related to wages; severance, vacation and sick pay; pension contributions; tuition refund; overtime payments; the participation in a merit kitty; the recall of employees improperly laid off with backpay; the reimbursement for medical expenses incurred by such individuals; and the reclassification of drafting employees wrongly classified. In addition, Zylla asked for a full accounting to determine whether the Vallejo employees received the benefits they were entitled to. The meeting closed with Zylla's request for an answer to the grievance within the time prescribed in the contract. There is a conflict in testimony given by Schmidt and Zylla as to whether at this meeting Zylla expressly disavowed that the Union claimed to represent the Vallejo drafting employees. As Schmidt conceded that Zylla had

made such a statement on another occasion, I find it unnecessary to resolve this conflict.

By letter dated August 25, Schmidt rejected the grievance. Referring to the Company's application to the State Supreme Court to modify the award, discussed below, and to its previously filed unfair labor practice charge, the letter stated that compliance with the Union's grievance requests "would be unlawful under . . . [the] Act" and that the Company accordingly "decline[d] to follow the course requested by [its] grievance." On August 27, the Union responded that it would not accept the Company's answer and proposed arbitration, as provided for in the contract, to resolve the compliance problem, listing the names of three individuals from which to select an arbitrator. In reply, Schmidt wrote to the Respondent that it appeared to be

> . . . pointless to present questions to another arbitrator which have not only already been arbitrated but are currently pending before both the New York court and the Board. However, subject to our right to argue the non-arbitrability of this claim before the arbitrator, we are, pursuant to our obligations under the contract, by this letter indicating our rejection of the names suggested and submitting in place of them the three arbitrators named below. We would point out, in doing so, that we consider this request to arbitrate in itself to be further evidence supporting the charge now pending before the Board.

Thereafter, the Respondent and the Company agreed upon an arbitrator and a hearing was scheduled for November

23. However, by mutual agreement of the parties, the hearing was indefinitely postponed.

4. The representation proceeding; the state court suit to modify the award

On May 10, a few weeks after the Roberts arbitration award was rendered, the Respondent filed a representation petition with the Board's Region 20 in San Francisco (Case No. 20-RC-10035), requesting an election in a residual unit of draftsmen [11] and clerical employees at the Vallejo facility. Pursuant to the Regional Director's Decision and Direction of Election, issued on July 8, an election was held on August 5 which the Respondent lost by a vote of 2 to 0 with one ballot being challenged.[12]

During the pendency of the representation proceeding, the Company filed on July 20 a petition in the New York Supreme Court, New York County, to modify the Roberts award by vacating the second sentence which directed the Company to apply to the Vallejo drafting employees "the wages and other terms of employment contained in the [New York agreement]—(excluding the Union shop and other representation clauses) and retroactive to June 5,

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[11] It appears that at this time two technical employees whose job entailed drafting work were allegedly in layoff status.

[12] The Respondent filed timely objections, alleging the discriminatory discharge of two draftsmen and an engineering clerk and other misconduct. The allegations also became the subject of an unfair labor practice charge filed by the Respondent on August 16 (Case No. 20-CA-6958) (G.C. 12). Following investigation, the Regional Director, on September 14, dismissed the charge. On appeal, the dismissal was sustained by the General Counsel. Thereafter, on December 16, the Regional Director overruled the objections in the representation proceeding and issued a Certification of Results of Election.

1970." [13] In support of its petition, the Company argued that this part of the award was not based on any issue submitted to the arbitrator and, secondly, that it was in excess of the arbitrator's power because it directed action which would put the Company in violation of the Act. The Respondent answered the petition, requesting confirmation of the award in all respects. On November 2, the State Court handed down its decision, granting the Company's petition on both grounds urged by the Company. Accordingly, on December 2, the Court entered judgment, striking the second sentence from the award and denying the Respondent's cross motion to confirm the award without modification. An appeal was thereafter taken to the Appellate Division of the Supreme Court where the matter is now pending until the final disposition of the unfair labor practice charge by the Board.[14]

C. *Concluding Findings*

Although deliberately refraining from attacking the validity of the arbitration award, the General Counsel contends that the Respondent's persistent demands that the Company honor the award and apply their current New York contract to the three technical employees who performed drafting work at the Vallejo, California, plant

[13] The *Sperry Division of the Sperry Rand Corporation* v. *Local 445, International Union of Electrical, Radio and Machine Workers, AFL-CIO*, Index No. 15910/71. Not challenged was the validity of the first sentence of the award which stated that, "[a]s a matter of law, the technical personnel performing drafting work at the Company's plant at Vallejo, California, are not under the coverage of the collective bargaining agreement with Local 445."

[14] It appears from the Company's brief that the Appellate Division so ruled on the Respondent's motion on March 23, 1972, following the hearing in the present case.

in a manner exceeding the requirements of the award, and the Respondent's submission of the Company's noncompliance to the contractual grievance-arbitration procedures constituted attempts to secure recognition and to bargain as the exclusive representative of the Vallejo technicians in an enlarged inappropriate unit resulting from the addition of those employees to the previously certified, contract unit. Such conduct, the General Counsel urges, amounts to a refusal to bargain in an appropriate unit in violation of Section 8(b)(3) of the Act. The Company reaches the same conclusion except that, in sharp disagreement with the General Counsel, it argues that the award itself is in irreconciliable conflict with the Act and that therefore the Respondent's efforts to secure compliance were in breach of its statutory bargaining obligation, even though its demands were sanctioned by the award. In support of their positions, both the General Counsel and the Company rely principally upon *Smith Steel Workers*,[15] to be later discussed. Denying that its efforts to enforce the award violated its bargaining duty, the Respondent maintains that the award does not contravene the Act and is therefore entitled to deference by the Board. Moreover, it argues that its actions were not intended to achieve unlawful recognition as the bargaining representative of the Vallejo technical employees but rather were taken in furtherance of the Respondent's legitimate interests to preserve job opportunities for the Great Neck drafting employees covered by the New York contract by preventing the Company from establishing plants with inferior terms and conditions of employment to which drafting work could be

[15] *Smith Steel Workers (A. O. Smith)*, 174 NLRB 235, enfd., in part, sub nom. *Smith Steel Workers* v. *A. O. Smith*, 420 F. 2d 1 (C.A. 7).

diverted. As evidence of its lawful motivation, the Respondent asserts that nothing in the award or its conduct precludes the Vallejo technical employees from seeking, or the Respondent from granting them, more favorable working conditions.

On the basis of the record before me, I find the charge of unlawful refusal to bargain unsubstantiated by the evidence. As related above, the Respondent initially invoked the grievance-arbitration procedures prescribed in the parties' New York collective bargaining agreement to enforce a claimed contractual right to bring certain Vallejo technical employees who performed drafting work under the contract's coverage. Following hearing, the arbitrator issued his award, finding that Board law precluded him from treating those employees as an accretion to the certified contract unit, as the contract literally provided, and that consequently they were not covered therein. However, the arbitrator, after carefully considering the evidence and arguments advanced by the parties, nevertheless sustained the Respondent's right to have the contractual wages and other terms of employment, excluding the union shop and other representation clauses, applied to those employees, retroactively to June 5, 1970, the effective date of the contract. In so ruling, the arbitrator expressly denied the Respondent the status of bargaining agent of the Vallejo technical employees which would normally result from a plant accretion finding. When the Company adamantly declined to comply with the award, the Respondent again filed a grievance with the Company and invoked arbitration which, by consent of the parties, never reached hearing.

Certainly, the Respondent cannot be criticized for resorting to the arbitral process the parties themselves had

agreed upon in their contract as the "sole and exclusive remedy" for the resolution of "all [unsettled] disputes, differences and grievances which may arise out of this Agreement including claims arising out of breaches or threatened breaches or violations or threatened violations of this Agreement. . . ."[16] Arbitration, in the authoritative view, well serves the national labor policy of encouraging the practice and procedure of collective bargaining of which arbitration is a vital and integral part,[17] and is particularly suitable where, as here, the interpretation and application of a bargaining contract are involved.[18] Accordingly, the Board has held that in such cases it would give hospitable acceptance to an award rendered in a fairly conducted arbitration proceeding and withhold its processes, unless it is "clearly repugnant to the purposes and policies of the Act."[19] The critical questions then to be determined here are whether the Roberts award is by its terms, "clearly repugnant" under the Act because it unlawfully confers upon the Respondent exclusive representative status over the Vallejo employees in an enlarged

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[16] Article 26(F).

[17] *Collyer Insulated Wire, a Gulf and Western Systems Co.*, 192 NLRB No. 150; *International Harvester Company*, 138 NLRB 923, enfd. sub nom. *Ramsey* v. *N.L.R.B.*, 327 F. 2d 784 (C.A. 7), cert. denied 377 U.S. 1003; *Spielberg Manufacturing Company*, 112 NLRB 1080.

[18] *Collyer, supra; Coppus Engineering Corporation*, 195 NLRB No. 113; *Combustion Engineering, Inc.*, 195 NLRB No. 161; *Great Coastal Express, Inc.*, 196 NLRB No. 129; *Norfolk, Portsmouth Wholesale Beer Distributors Association*, 196 NLRB No. 165. To be sure, the Board has the undeniable authority to interpret contractual provisions where necessary to resolve unfair labor practice issues. *N.L.R.B.* v. *C & C Plywood Corporation*, 385 U.S. 421.

[19] *International Harvester, supra*, 138 NLRB at 927.

inappropriate unit [20] and whether the Respondent's efforts to achieve compliance with the award, in effect, amounts to an unlawful refusal to bargain within the meaning of Section 8(b)(3) of the Act. No question is raised concerning the arbitrator's impartiality or the fairness and regularity of the arbitration proceeding.

As shown above, there is nothing in the arbitration award which directs the Company to recognize the Respondent as the exclusive representative of the Vallejo technical employees as part of the certified contract unit. Acknowledging controlling principles regarding plant accretions to established bargaining units, the arbitrator, in a well-reasoned opinion, specifically declined to include the Vallejo technical employees in the contract unit.[21] While the award provides for the application of the nonrecognitional clauses of the contract to those employees, I am aware of no restriction in the Act prohibiting an employer, not improperly motivated, from extending to his unrepresented employees the same wage rates and other benefits a labor organization obtained for the employees it represents. Indeed, this is not an unfamiliar practice followed by employers to maintain good relations with his unrepresented employees. In these circumstances, I find that the award does not require the Company unlawfully to recognize the Respondent as the exclusive representative of the Vallejo technical employees as part of the contract unit, without being designated by those employees as their bargaining agent. For this reason, there is no basis for

[20] As indicated above, the General Counsel, unlike the Company, does not contend, nor does the complaint allege, that the Roberts award, as distinct from the Respondent's actions, offends the Act.

[21] In this respect, the arbitrator's award in this case differs from that involved in *Combustion Engineering, supra.*

the Company's contention that, if it honors the award, it would violate the Act under the Supreme Court's holding in the *International Ladies' Garment Workers'* case.[22] This being so, I find that the award is not "clearly repugnant to the purposes and policies of the Act" as to justify the Board, in its discretion, to refuse to refer to it.

Nor am I persuaded that the evidence establishes that the Respondent's efforts to enforce the award had as their aim the Respondent's recognition as the bargaining agent of the Vallejo technical employees as part of the New York contract unit. The only evidence in the record indicates that the Respondent's actions were motivated by a desire to preserve job opportunities for the Great Neck drafting employees by requiring the Company to observe, at least, the same wages and working conditions at the Vallejo plant for technical employees doing the same type of drafting work[23] and thereby to discourage the diversion of unit work from the Great Neck plants to the Vallejo facility where inferior conditions prevailed. Undeniably,

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[22] *International Ladies' Garment Workers' Union, AFL-CIO* v. *N.L.R.B.*, 366 U.S. 731. It is noted that the complaint does not allege that the award or the Respondent's actions restrained or coerced the Vallejo technical employees in the exercise of their statutory right to select a bargaining representative of their own choosing in violation of Section 8(b)(1)(A) of the Act. Cf. *N.L.R.B.* v. *Drivers, Chauffeurs, Helpers, Local Union No. 639 (Curtis Bros.)*, 362 U.S. 274 where the court held that peaceful picketing by a minority union for immediate recognition as the employees' exclusive representative did not violate employee rights under Section 8(b)(1)(A).

[23] That the preservation of job opportunities was the Respondent's objective is shown by the fact that there is nothing in the award or in its demands which precluded the Company from unilaterally granting the Vallejo technical employees more favorable conditions of employment.

the preservation of unit work is a legitimate union objective.[24] While one of the Respondent's demands related to the recall of two Vallejo technical employees who were assertedly laid off improperly may perhaps suggest that the Respondent was interested in seeking recognition, it does not necessarily establish that the Respondent sought to represent the Vallejo technical employees as part of the New York contract unit, which is the very theory of both the General Counsel's and the Company's case. Such a demand is entirely consistent with the Respondent's determination only to achieve reinstatement of the laid off employees without recognition,[25] or, at most, to represent the Vallejo technical employees in a separate unit. In fact, on May 10, shortly after the rendition of the award, the Respondent filed in the Board's San Francisco region a petition for certification in a residual unit of Vallejo employees. It was during the pendency of that proceeding that the Respondent demanded the recall of the two laid off employees. Probably, by thus injecting itself into this matter, the Respondent expected to win over the employees' support in the forthcoming election. Accordingly, I find insufficient evidence that the Respondent's actions and demands were calculated to achieve recognition and bargaining rights as the exclusive representative of the Vallejo technical employees as part of the New York contract unit. In view of this finding, the Board's holding in

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[24] Cf. *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612.

[25] See, for example, *Local 259, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW, AFL-CIO (Fanelli Ford Sales, Inc.)*, 133 NLRB 1468, where the Board held that picketing directed solely at securing the reinstatement of a discharged employee was not to gain recognition in violation of Section 8(b)(7) of the Act.

Smith Steel Workers,[26] heavily relied upon by the General Counsel and the Company, is clearly inapplicable. In that case, a union, in defiance of a Board unit clarification order, insisted on continuing to represent under its contract certain employees long considered to be included in a certified unit it had been representing. In the unit clarification proceeding, the Board determined that the disputed employees properly belonged in another certified unit represented by another labor organization. The union, however, persisted in its representational claim; unsuccessfully attempted to file a grievance and to initiate arbitration pursuant to its contract; and finally brought suit in the United States District Court under Section 301 of the Act to compel the company to proceed to arbitration. The Board held that, by refusing to abide by its unit clarification order and by insisting on continued recognition for the disputed employees, the union attempted to bargain in an inappropriate unit in violation of Section 8(b)(3) of the Act.[27] As shown above, this plainly is not the situation involved in the present case.[28]

In sum, I conclude that the General Counsel failed to sustain his burden of proving that the Respondent refused

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[26] *Smith Steel Workers (A. O. Smith)*, 174 NLRB 235, enfd., in part, sub nom. *Smith Steel Workers* v. *A. O. Smith*, 420 F. 2d 1 (C.A. 7).

[27] In enforcing the Board's order, the court, however, did not rely on the union's institution of the Section 301 suit, as did the Board.

[28] Similarly distinguishable are the other cases cited by the General Counsel and the Company. Thus, for example, in *District 50, United Mine Workers of America (Central Soya Company, Inc.)*, 142 NLRB 930, the Board found a violation of Section 8(b)(3) of the Act where the union demanded that the bargaining negotiations cover employees expressly excluded from the certified unit it represented. In *International Longshoremen's Association*, 118 NLRB 1481, the same violation was found where the union pressed its demands for bargaining on a broader basis than the unit certification.

to bargain with the Company in an appropriate unit composed of the Company's technical employees in the Metropolitan New York City area. Accordingly, I recommend dismissal of the complaint in its entirety.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I making the following:

Conclusions

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not engaged in the unfair labor practices alleged in the complaint.

Recommended Order [29]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, as amended,

It is ordered that the complaint issued herein against the Respondent, Local 445, International Union of Electrical, Radio and Machine Workers, AFL-CIO, be, and it hereby is, dismissed.

Dated at Washington, D.C.

Paul Bisgyer
Paul Bisgyer
Trial Examiner

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[29] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Appendix E, Order of Court of Appeals of the State of New York Denying Leave to Appeal

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twelfth day of October A. D. 1973.

Present,

HON. STANLEY H. FULD, *Chief Judge, presiding.*

Mo. #658

THE SPERRY DIVISION OF THE SPERRY RAND CORP.,

Petitioner-Respondent,

vs.

LOCAL 445, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO,

Respondent-Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied, with ten dollars costs and necessary reproduction expenses.

A copy

GEARON KIMBALL

(SEAL)

Appendix F, Opinion of Appellate Division, First Department

NEW YORK LAW JOURNAL—Wednesday, June 20, 1973

By Markewich, J.P.; Murphy, Lane, Tilzer and Macken, JJ.

7160. Matter of the Sperry Division of the Sperry Rand Corporation, pet-res (Local 445, International Union of Electrical, Radio and Machine Workers, AFL-CIO, res-ap)—Judgment, Supreme Court, New York County, (Amsterdam, J.), entered on Dec. 2, 1971, unanimously affirmed. Respondent shall recover of the appellant $60 costs and disubrsements of this appeal. No opinion. Order filed.

Appendix G, Order of Affirmance of Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 19, 1973.

Present:

HON. ARTHUR MARKEWICH, Justice Presiding
FRANCIS T. MURPHY, JR.,
MYLES J. LANE,
GEORGE TILZER,
DANIEL E. MACKEN,
Justices.

7160

THE SPERRY DIVISION OF THE SPERRY RAND CORP.,

Petitioner-Respondent,

against

LOCAL 445, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Respondent-Appellant.

An appeal having been taken to this Court by the respondent-appellant from the judgment of the Supreme Court, New York County (Amsterdam, J.), entered on

December 2, 1971, granting petitioner's motion to modify the award in the instant action by striking therefrom the second sentence thereof and as so modified confirming the award, and said appeal having been argued by Mr. Sylvan H. Elias of counsel for the appellant, and by Mr. Herbert Prashker of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed, and that the respondent shall recover of the appellant $60 costs and disbursements of this appeal.

Enter,

HYMAN W. GAMSO,
Clerk.

Appendix H, Decision of Special Term

SUPREME COURT

NEW YORK COUNTY

SPECIAL TERM : PART I

Index No. 15910

THE SPERRY DIVISION OF THE SPERRY RAND CORPORATION,

Petitioner,

against

LOCAL 445, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Respondent.

AMSTERDAM, J.:

This is an application pursuant to CPLR § 7511 for a judgment modifying the arbitrator's award rendered herein.

The stipulated and sole issue submitted to the arbitrator for decision was:

> "Whether the technical personnel performing drafting work at Vallejo, California, are under the coverage of the collective bargaining agreement with Local 445?"

The Opinion and Award decided that issue as follows:

> "As a matter of law, the technical personnel performing drafting work at the Company's plant at Vallejo, California, are not under the coverage of the collective bargaining agreement with Local 445."

The arbitrator went on though:

> "However, they shall be governed by the wages and other terms of employment contained in the Local 445 Agreement (excluding the Union Shop and other representation clauses) and retroactive to June 5, 1970."

Petitioner asserts that the arbitrator exceeded his authority in rendering the award in adding the second sentence thereto and that it could be stricken from the Opinion and Award of the arbitrator without affecting the merits.

The Court agrees. The striking of said second sentence of the award would not affect its merits. That part of the award is clearly unnecessary to a disposition of the submission to the arbitrator.

Moreover, the discussion contained in the arbitrator's decision clearly indicates that the direction contained in the award is unnecessary and beyond the scope of his authority once the issue submitted was decided.

Lastly, the decision would bind the petitioner herein and the technical personnel at the Vallejo, California, plant to a contract and agreement which neither bargained for. The imposition of such terms upon employees who did not vote for the union representation herein is also violative of the National Labor Relations Act (International Ladies' Garment Workers Union, AFL-CIO v. NLRB, 366 U. S. 731).

The arbitrator's award is modified by striking therefrom the second sentence thereof and, as modified, it is confirmed.

Settle judgment.

Dated: November 2nd, 1971.

BIRDIE AMSTERDAM
J. S. C.

Appendix I, Judgment Modifying Award

At a Special Term Part I of the Supreme Court, held in and for the County of New York, at the Courthouse thereof No. 60 Centre Street, Borough of Manhattan, City of New York on the 16th day of November, 1971

Present:

HON. BIRDIE AMSTERDAM,
Justice.

Index No. 15910

THE SPERRY DIVISION OF THE SPERRY RAND CORPORATION,

Petitioner,

against

LOCAL 445, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Respondent.

The Petitioner having moved this Court for a Judgment pursuant to Section 7511 of the Civil Practice Law and Rules modifying the award herein dated April 19, 1971 and confirming the award as so modified, and the Respondent having cross-moved this Court to confirm the award without modification, and the said motions having duly come on to be heard before this Court on the 12th day of October, 1971,

Appendix I

Now, on reading and filing the notice of petition dated July 19, 1971, the petition verified July 20, 1971, the affidavits of William J. McMorrow sworn to July 19, 1971 and September 28, 1971, and the affidavit of Herbert Prashker sworn to October 12, 1971, and the exhibits thereto annexed, in support of the motion and in opposition to the cross-motion, and the answer verified July 29, 1971, the affidavit of Sylvan H. Elias sworn to August 4, 1971, the affidavit of Everett E. Lewis sworn to October 11, 1971, and the exhibits thereto annexed, in opposition to the motion and in support of the cross-motion,

And after hearing Herbert Prashker, attorney for the Petitioner, in support of the motion and in opposition to the cross-motion, and Everett E. Lewis, attorney for the Respondent, in opposition to the motion and in support of the cross-motion, and due deliberation having been had thereon, and upon reading and filing the memorandum decision of the Court, it is, on motion of Poletti Freidin Prashker Feldman & Gartner, Esqs., attorneys for Petitioner

ADJUDGED AND ORDERED that the motion of Petitioner to modify the award herein by striking therefrom the second sentence thereof and, as so modified, to confirm the award be, and it hereby is, granted; and it is further

ADJUDGED AND ORDERED that the cross-motion of Respondent to confirm the award without modification be, and it hereby is, denied; and it is further

ADJUDGED AND ORDERED that the award herein be, and it hereby is, modified by striking therefrom the second sentence thereof, which provides as follows:

"However, they shall be governed by the wages and other terms of employment contained in the Local 445 Agreement (excluding the Union Shop and other representation clauses) and retroactive to June 5, 1970.",

and that, as so modified, the award be, and it hereby is, confirmed, so as to read in full as follows:

"As a matter of law, the technical personnel performing drafting work at the Company's plant at Vallejo, California, are not under the coverage of the collective bargaining agreement with Local 445."

Enter

S/ BIRDIE AMSTERDAM
J. S. C.

(Signature—Illegible)
Clerk

Filed
Dec 2 1971
County Clerk's Office
New York

Appendix J, Opinion and Award of the Arbitrator

In the Matter of the Arbitration

Between

SPERRY SYSTEMS MANAGEMENT DIVISION OF SPERRY RAND CORPORATION

and

LOCAL 445, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC

APPEARANCES:

For the Company:

William J. McMorrow, Labor Counsel
G. J. Rolmell, Labor Relations Manager
T. B. Latrell, Manager Personnel Relations
J. A. Schmidt, Labor Relations Supervisor
Basil Staros, Manager, Ocean Systems

For the Union:

Sylvan H. Elias, Attorney
Vladeck, Elias, Vladeck & Lewis
H. Zylla, President, Local 445
W. Kenneally, Plant Chairman, Engineers' Union
H. G. Windecker, Engineers' Union Grievance Committee
Richard Barba, Engineers' Union Shop Steward, California

Appendix J

In a grievance dated November 27, 1970, the Union protested that the Company violated Article I of the collective bargaining agreement dated June 5, 1970 between Sperry Systems Management Division of Sperry Rand Corporation, hereinafter referred to as the Company, and Local 445, International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC, hereinafter referred to as the Union, by failing to apply the terms of their Agreement to technical personnel performing drafting at Vallejo, California. The Arbitrator was requested to require the Company to apply the collective bargaining agreement to these technical employees and to make them whole for any resulting losses. The Company denied the grievance on December 11, 1970, and the dispute was duly processed to arbitration.

The issue as submitted by the parties was the following:

> Whether the technical personnel performing drafting work at Vallejo, California, are under the coverage of the collective bargaining agreement with Local 445?

The Company stipulated that if the Arbitrator's finding is in the affirmative, the terms of the Local 445 collective bargaining agreement will be applied to the technical personnel at Vallejo California as of June 5, 1970.

Article I of the collective bargaining agreement reads, as follows:

> ARTICLE I
>
> *This Agreement shall apply to all plants now operated by the Employer*, its successors and assigns, *wherever situated.* In the event any nonsupervisory (except engineers) employees within the IUE bar-

gaining units of the Company are transferred to a location other than a plant now operated by the Company, any additional personnel hired at such location to work with such transferred employees in bargaining unit jobs, as hereinafter described, shall be governed by their terms of this Agreement. (Emphasis added)

The parties agreed upon these facts:

1. There are members of the Lake Success Engineers' Union bargaining unit who are sent to Vallejo, California from time to time and are represented by the Engineers' Union during such assignments.

2. New engineering personnel hired at Vallejo, California have become part of the Engineer's Union bargaining unit. The Recognition Article I of the Local 445 Agreement is identical with that in the collective bargaining agreement with Local 450 and the Engineers' Union, but excluding the "(except engineers)" phrase.

3. Part of the premises at 705 Lassen Streef, Vallejo, California was occupied by Sperry Systems Management Division as of June 5, 1970, and by December 1, 1970 the Company occupied substantially the entire premises which is a one-story brick building with nine rooms and having approximately three thousand square feet of loft space. There is only one department, Department 2530, which reports to Sperry Systems Management Division in Lake Success, and not to a Vice President.

4. The employees claimed by Local 445 as within the bargaining unit are Judith Eskew, classified by the Company as a Technical Assistant, Robert M. Swart, classified by the Company as the Senior Technical Assistant, and Anaise Sanders, classified by the Company as a Technical Assistant. These three employees are the only ones hired at Vallejo, California, doing this work.

5. The Company stipulated that the work performed by these employees is drafting that is similar to that performed by employees under the Local 445 collective bargaining agreement.

6. No employees in the Local 445 bargaining unit at Lake Success have been sent to Vallejo, California.

The Union's position is that under Article I, the Agreement is applicable to all plants "now operated by the Employee . . . wherever situated," and that the Vallejo, California plant which employs twenty-four (24) employees including the three (3) technicians and the transferred and newly hired engineers, became part of the Local 445 bargaining unit as of June 5, 1970.

Henry Zyall, President, Local 445, explained that the Sperry Systems Management Division only performed technical and engineering services and did not manufacture any product; that he had observed the engineering and technical employees at Vallejo, California, and they performed the same drafting work that was being done at the Company plants in Syosset and Lake Success. He explained that the premises at Vallejo was located on a residential street but with commercial buildings on the

corners and on the adjacent street; that it previously also had been occupied as a commercial premises.

Zylla pointed out that three (3) Senior Draftsmen at Lake Success were updating work performed at Vallejo, California, and that one job at Lake Success had been brought from Vallejo because it had insufficient manpower.

Reybold Bisordi, an Engineers' Union member, and who had been assigned to Vallejo, California for a year, confirmed that he had brought work back from Vallejo on two (2) occasions because of the overload at Vallejo. He had laid out the work and the three (3) technicians at Lake Success were working on it under his guidance.

The Company maintained that the premises at Vallejo, California was not a "plant" within the meaning of the first sentence of Article I, and that even assuming arguendo, that it was, it was not covered by the Local 445 contract since the Article never was intended or contemplated to encompass this situation. The history of the Company's relations with Local 445 and its predecessor, and with the other locals with which it has had collective bargaining agreements at Lake Success was said to support this position; that the original terms of Article I were laid down in an Award on contract terms by Arbitrator Paul R. Hays in 1943 in a proceeding between Sperry Gyroscope Co., Inc. and Local 450 and which provision subsequently was adopted by the other Local Unions in their contracts with the Company.

The Article I of the Hays' Award read:

> This contract shall apply to plants now owned and operated by the Employer wherever situated.

The Company submitted that the "plants" referred only to those operated by Sperry Gyroscope Company, Inc. at the time. Joseph Schmidt, Labor Relations Supervisor, and who had been Payroll Supervisor, testified that in 1943 the Company had about 27,000 employees and the "plants" were at 40 Flatbush Avenue, Brooklyn (5000 to 6000 employees); Gair Buildings (1500 employees); Bush Terminal 25 (2500 employees); Bush Terminals 7 and 8 (500 employees); Carey Building (100 employees); Tag Building (1500 employees); 101 Willoughby Street and 81 Willoughby Street (300 to 500 employees); Nassau Plant (13,000 employees); Garden City (800 to 1000 employees); Nassau Plant (13,000 employees); Garden City (800 to 1000 employees); Paramount Building, Brooklyn (25 employees); and Ninth Street Garage (20 employees). There were members of Local 450 in each of these buildings.

The Company further argued that it would be illegal under the Labor-Management Relations Act to incorporate the Vallejo, California facility under Local 445's collective bargaining agreement. It also submitted a contract demand made by the Unions during the 1964 negotiations that Article I shall apply to "successors and assigns" and to "Any new plants which may be established within a one-hundred mile radius of Lake Success." The Company had rejected this latter proposal but accepted adding the "successors and assigns" proviso.

The Company also noted that in 1950-1960, Sperry Gyroscope Co., Inc. established separate corporate divisions with plants at Salt Lake City, Clearwater and Gainsville, Florida, Charlottsville, Virginia, Phoenix, Arizona and Sunnydale, California, which reported to the President of Sperry Gyroscope Co., Inc. and the Union conducted

organizing campaigns at these plants at various times and never relied on Article I.

The Company pointed out that the Wheeler Electronics Company, Connecticut, whose production and maintenance employees are represented by the International Brotherhood of Electrical Workers, and the Shreveport, Louisiana plant where two (2) other unions represented the employees, both reported directly to the Sperry Gyroscope Division; that the Space Support Division, a separate corporate division at Huntsville, Alabama and Goddard Space Center, Maryland, also employed engineers who were not represented by the Engineers' Union.

In 1967, the Company had agreed that Training Aid Illustrators who had been assigned to a field training school near the Lake Success Plant shall be included under the Local 445 bargaining unit. According to the Union, these employees had been located in the basement of a former furniture store with an engineering operation on the upper level and having a total of about one hundred (100) employees in the various groups; that these Illustrators also were located on one floor of another building at Garden City that measured approximately 80 feet by 50 feet and they had sixty-five (65) to eighty-five (85) employees, including engineers.

ARGUMENT BY THE UNION

The Union maintained that since the Company operated the California Plant when the Agreement was made, under the first sentence of Article I, the three (3) employees involved were covered and had to be included within the Local 445 bargaining unit. It argued that the clear, unequivocal and uncontroverted evidence presented by Zylla

was corroborated by Schmidt's testimony that there were "plants" with twenty (20) and twenty-five (25) employees in 1943, and which showed that the numbers of employees did not determine whether there was a "plant," but rather the work performed. It submitted that there was nothing illegal or unlawful about the contractual provision; that under the same contractual provision in the Engineers' Union agreement, the Company effectuated Article I but took a different position with Local 445, asserting that what was a plant and legally covered under the Engineers' Union agreement was neither under the Local 445 agreement.

The Union urged that if the Arbitrator was to determine that Article I was invalid, it would contravene the clear and unambiguous contract language and make a new Agreement for the parties; that in a different forum the clause might come under more severe scrutiny, but that this could not affect its validity and enforceability in an arbitration proceeding, and particularly where the provision has been in the contract for many years.

The Union contended that the Arbitrator had to carry out the clear mandate of the language of the contract that encompassed the California "plant" that was "operated by the Employer" on the effective date of the Agreement, and even though it was not situated in Long Island; that the California and Lake Success Plants nevertheless operated closely and dovetailed some of their work, as Bisordi had testified.

The Union asserted that even arguendo, if the Arbitrator exceeded his jurisdiction and held that the Local 445 bargaining unit did not include the three (3) employees in California, all of the provisions of the Agreement had to

be applied to all persons doing work in California which, had it been done in Lake Success, would have been bargaining unit work; that the Agreement required that it be "applied to all plants now operated . . . wherever situated."

In support of its argument that the Arbitrator had the power to enforce the provisions of Article I, the Union cited awards in which arbitrators held that the dismissal of an unfair labor practice complaint before the National Labor Relations Board did not preclude processing a grievance under the collective bargaining agreement based upon the same subject matter on the grounds that the arbitrator's power and jurisdiction derived from the collective bargaining agreement; that matters involving questions of unfair labor practices were arbitrable since the jurisdiction of the NLRB was not exclusive and a matter that was within the arbitration area under a contract also could be an unfair labor practice and the arbitrator retained jurisdiction to hear and decide the case even though it would not affect the power of the Board to act and the Board's decision would prevail if contrary to the arbitrator's award; that the arbitrator was not precluded from assuming jurisdiction when no Labor Board proceedings were pending.

The Union also presented citations summarizing Board policy that recognized that national policy entrusted the responsibility for securing performance of contractual obligations to other tribunals, recognizing the special values of the arbitration process.

The Union rejected as irrelevant to the instant issue the Company's arguments on the Unions' 1964 contract proposals that were rejected since it concerned only plants

that "may be established" and did not affect the language of the contract that covered plants already in operation at the date of execution of the Agreement. It submitted that this addition was to cover future plants and not those in existence at the time the Agreement was executed.

The Union concluded that this grievance should be sustained and the Company required to recognize that Article I was binding on all employees doing drafting work at the California Plant who should be included in the Local 445 bargaining unit and be made whole for all progressions, wage increases and fringe benefits that accrued in the Local 445 bargaining unit from June 5, 1970.

Argument by the Company

The Company argued that the minimal rented floor space at Vallejo was not a "plant;" that in reality and in the common usage of the term the Company had not opened a new Sperry Plant at Vallejo; that the descriptions of the location tended to establish it was a work place falling into the second of the two (2) categories in Article I, a "location other than a plant" and which contemplated that Sperry employees may work at a non-Sperry location that is or is not a "plant;" that where as in this case the place was a "location other than a plant now operated by the Company," the Agreement was applicable where employees were employed locally "to work with such transferred employees in bargaining unit jobs," and which was said to distinguish the exempt engineers hired at Vallejo from the three (3) employees claimed by Local 445 since no Local 445 draftsmen were transferred to Vallejo, but Great Neck-based engineers were.

The Company also noted that Article I did not state that the contract shall apply to these employees or that Local 445 shall represent them, but that they "shall be governed by the terms of this Agreement," and which could mean, "as if the Agreement applied to them, it being understood it does not actually do so and that what the parties are intending is that they shall receive the same pay and other terms of employment, no better and no worse, than employees covered by the Agreement;" that this was a plausible alternative version to that advanced by the Union.

The Company stressed that if the Vallejo location is viewed as a plant, the provision could not lawfully be applied and would be unenforceable as a contract right; that as a matter of NLRB law, Article I could not be applied to a plant distant from those plants on Long Island for which Local 445 was the certified bargaining representative; that the legal scope of Article I legally coincided only with what the Company maintained was its original intent.

The Company asserted that it was an unfair labor practice for parties to a collective bargaining agreement to apply their Agreement to a new plant where the Union did not represent the majority, except as an accretion to the bargaining unit; that in the cited cases, the Board had held that it was repugnant to the statutory policy of ensuring employees at a new plant the opportunity to decide by their own separate majority whether they wished to become a part of a larger group; that distance between plants was a key factor. The Company cited NLRB decisions in a report of its position that where there were union security provisions, the accretion excep-

tion was a restricted one, and including rejections of its applicability by the NLRB where the two (2) plants were approximately forty (40) miles apart and there was no interchange or transfer of employees. It noted a long series of cases in which this geographical factor was considered as determinative of whether the accretion doctrine applied, and examination of them showed they were far less than 3,000 miles apart from the plant for which the Agreement was signed.

The Company added that its agreement to recognize the accretion of the Training Aid Illustrators in 1967 occurred when the work of certain of these Training Aid Illustrators evolved over the years to where they were performing the duties of Technical Illustrators, and that they worked in the Great Neck Plant and not 3,000 miles away.

The Company summarized that under the new plant cases, the first sentence of Article I could not lawfully cause the contract to be applied to a plant distant from its Long Island Plant nor establish the Union's representative status at such new plant since the parties were not free to establish these results by contract and regardless of majority choice.

The Company also asserted that its position was supported by the historical background, starting with the Award by Arbitrator Hays in October, 1943, under which the word "plant" had an immediate meaning for the parties; that Section 6C of that Award referred to "shifts now prevailing in the plant," and Section 6D referred to "transfer of any Shop Steward from one plant to another;" that under the grievance procedure the Plant Grievance Committee "shall be employees of the same

plant," and there was provision for "a Central Grievance Committee."

It also referred to Schmidt's testimony of the plants in existence in 1943, with none in California or elsewhere, and only those in Brooklyn and the newly built plants in Garden City and Great Neck; that the contract was concerned only with what occurred "east of the Brooklyn Bridge" when Sperry was leaving Brooklyn and opening up plants further out on Long Island; that this was the credible context that had to be lawfully applied twenty-seven (27) years later, there being no significant act or statement more recently by either party inconsistent with this view.

The Company also recalled that during the 1950's when Sperry opened and operated new plants all over the United States, none of the locals claimed that Article I was applicable to any of them, but rather the IUE conducted organizing campaigns at several of these plants and with NLRB conducted elections; that as late as 1964 the Union made the proposal to apply the contract to any new plants established within a 100-mile radius of Lake Success, and which the Company rejected, so that the Agreement with respect to Article I remained the same as prior to the 1964 contract.

The Company concluded that as a matter of law and/or as a matter of contract construction the Union's claim had to be denied whether or not the Vallejo located was viewed as a "plant;" that it was not a "plant" and not covered by the first sentence of Article I by its own terms, and that the conduct of the parties would not rationally permit such a contract construction; that the Union could not obtain representative status for the employees concerned as a contract right.

Appendix J

DISCUSSION

There is no contractual or other justification for the Company's position that would deny that a Company facility located in a premises under its sole control and where it conducts its own operations, is a "plant" because of its size and/or physical location. As the Union has noted, as far back as 1943 the Company (or its predecessor) had plants employing as few as twenty (20) and twenty-five (25) employees. And if the Company chose to house its activities in a residential or semi-residential area, this would hardly change its character as a Company operation. The basic issue therefore is whether the Company shall be required to comply with the provisions in the first sentence of Article I for this plaint that was existent when the contract was signed on June 5, 1970.

The Company's refusal to recognize the representative status of Local 445 at the Vallejo plant is not necessarily inconsistent with its grant of coverage under the Engineers' Union contract containing substantially the same Article I. Its action vis-a-vis the Engineers' Union was premised on the Company's interpretation of the second sentence of Article I dealing with "a location other than a plant now operated by the Company," and to which employees within the bargaining unit are transferred. On its face, this description would appear to be directed towards non-Sperry premises at which additional employees are hired by Sperry locally to work with the transferred employees who are part of the bargaining unit. In effect, these transferred employees remain in the original bargaining unit and the new employees accrue to it by working with the bargaining unit personnel. This is distinguishable from being employed in a separate Company

group where there has not been this transfer or an interchange of employees.

Whether this concept can be applied to some undefined kind of Sperry facility that would not be classified as some type of "plant" need not be resolved in this case. As will be seen below, there is a recognizable difference in the relationship between the Great Neck plant and the Vallejo plant with respect to the Engineers' Union bargaining unit due to the interchange of engineers between both plants. None of the employees in the Local 445 bargaining unit have been transferred or assigned to Vallejo even though similar work is being done at both plants.

The Company has stressed that in its original and subsequent application, Article I was intended to concern itself only with what occurred, "east of the Brooklyn Bridge," and to cover Sperry's opening of new plants further out on Long Island. The Union has pointed out that the contract language is clear and unambiguous that the Agreement is to apply "to all plants now operated by the Company," and that the Vallejo plant was in existence and operated by the Company on the effective date of the Agreement, June 5, 1970. Article I expresses no geographical limitation that the Company would read into the clause. Rather, it expressly encompasses such plants ". . . wherever situated." Even the several clauses in the original award that used the word "plant" would not show an intent to restrict its application strictly to Long Island. Like other documents written in anticipation of changing circumstances, its unequivocal terms must be applied in the light of contemporary conditions absent evidence of agreement or practice that would establish the

usage of the contract language as "words of art," clothing them with a singular meaning.

The Company's references to the "plants" it opened all over the United States during the 1950's, and for which the IUE made no claim under Article I, does not present a history that would represent the proof of its narrowed coverage as urged by the Company. The so-called plants mainly were corporate divisions that were separate entities that would have their own plant or plants. The fact that they reported to the President of Sperry Gyroscope Co., Inc. would not per se make them "plants" of that Company. Of the others, the record does not show under what circumstances Wheeler Electronics Company and the Shrevesport, Louisiana Plan, both of whose employees have been represented by other unions, became part of the Company. Moreover, it would appear that any claim for their accretion to the bargaining unit under Article I may have been subject to the legal impediments under law such as that which bars the Union's claim in the present case. In any event, the Company has not presented any situation analogous to the present case where the Union failed to exercise the right it has sought to be enforced here.

The Company also has pointed to the Union's proposal in the 1964 negotiations to have the contract apply to, "any new plant which may be established within a 100-mile radius of Lake Success," as evidence that the Union was well aware of the limitations of Article I. The Union has noted the distinction between the proposed new language that was directed towards new plants established during the term of the current agreement, and Article I that covered only plants in operation when the Agreement was executed.

In the final analysis, therefore, the critical question in this case comes down to whether the Arbitrator can apply the Agreement to the Vallejo plant pursuant to Article I in the face of the patent illegality of effecting an accretion of the Vallejo employees to an existing bargaining unit that is 3000 miles away, and absent record support of such relating factors as the interchange of employees. This is the condition that distinguishes the Engineers' Union recognition from the Local 445 situation. To encompass the draftsmen at Vallejo under the Local 445 contract without their expressing this by a voluntary majority selection indisputably would violate well-established principles under the Labor Management Relations Act, and as expressed in the numerous NLRB cases cited by the Company. In these factual circumstances, the Arbitrator's duty and responsibility is not to direct the Company to engage in an unlawful act pursuant to a contract provision that as a matter of law clearly is unenforceable for this particular plant. The Arbitrator is quite cognizant of decisions by courts and arbitration awards that recognize the concurrent jurisdiction of arbitrtaors in matters that are both disputes under a contract as well as questions of law, but with the NLRB's decisions preemptive. The same subject giving rise to both legal and contract rights can be tried in the respective forums, and NLRB policy generally has viewed national policy as entrusting responsibility for securing performance of contractual obligations to the arbitration procedure. But that is not the problem in this case. There is no dispute here concerning the Arbitrator's jurisdiction under the Agreement to interpret and apply Article I even though the inherent question of representation also is subject to the NLRB's authority. Here the dilemma is generated by the fact that the law is clear and

would deny enforcement of the provision as requested by the Union even if contractually clear. Inevitably, the governing law must prevail.

There frequently are conditions where the legal enforceability can be arguable, or where the arbitrator may lack the expertise or the qualifications to judge the law as applied to the submitted issue and where he certainly should follow the contract. However, in this case the variance from the law is so evident that there can be no hesitancy in denying its implementation to the extent that it conflicts with prevailing law.

Nonetheless, in rejecting the enforcement of the Union's contract rights to the full, the Arbitrator believes that his obligation is to require compliance to the extent that it would be legal to apply the contract terms agreed upon by the parties, and particularly since there is such identity in the work being done in Vallejo and at Syosett and Lake Success. Consequently, as the alternative to the enforcement of the Agreement in whole, the Company should be required to enforce Article I to the extent that the technical personnel performing drafting work at the Vallejo plant shall be governed by the same wages and other terms of employment as set forth in the Local 445 Agreement (but excluding any Union shop or representation clauses), retroactive to June 5, 1970.

Therefore, the undersigned, constituting the duly authorized Arbitrator, designated in accordance with the terms of the collective bargaining agreement between the parties and dated June 5, 1970, herewith makes the following

Appendix J

AWARD

As a matter of law, the technical personnel performing drafting work at the Company's plant at Vallejo, California, are not under the coverage of the collective bargaining agreement with Local 445. However, they shall be governed by the wages and other terms of employment contained in the Local 445 Agreement (excluding the Union Shop and other representation clauses) and retroactive to June 5, 1970.

BENJAMIN C. ROBERTS
Benjamin C. Roberts, Arbitrator

April 19, 1971

State of New York
County of New York—ss.:

On this 19th day of April, 1971 before me personally came and appeared BENJAMIN C. ROBERTS, to me known and known to me to be the individual described herein and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

(Signature—Illegible)

Appendix K, Relevant Provisions of National Labor Relations Act as Amended

* * *

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8. (a) It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * *

Section 8. (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *

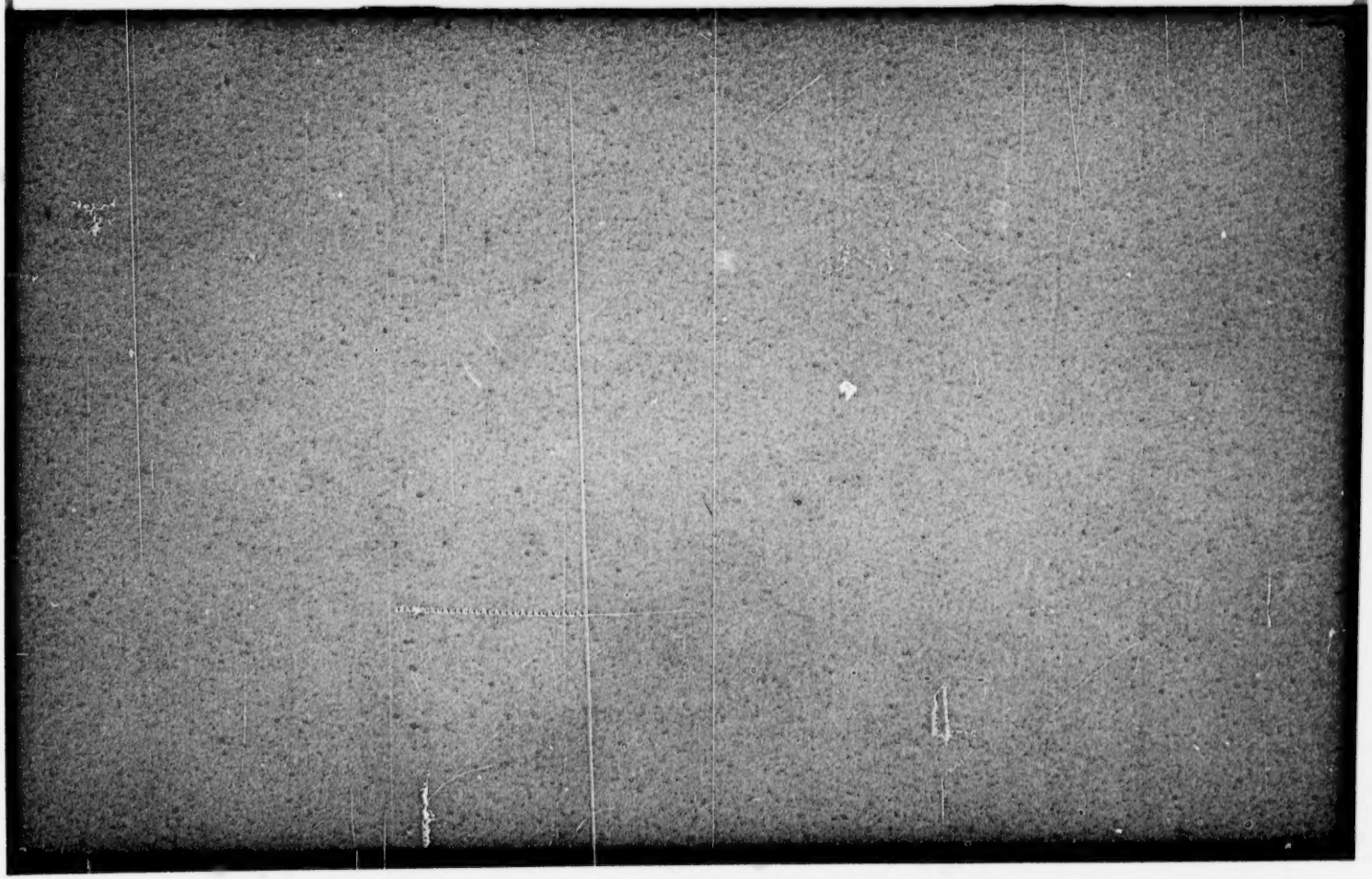
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Appendix K

Section 8. (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

* * *

Section 9. (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *



SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1712

LOCAL 445, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Petitioner,

vs.

SPERRY SYSTEMS MANAGEMENT DIVISION, SPERRY RAND CORPORATION,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR SPERRY SYSTEMS MANAGEMENT DIVISION, SPERRY RAND CORPORATION, RESPONDENT, IN OPPOSITION

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Opinions Below

The opinion of the Court of Appeals (Pet. App. A1-A14) is reported at 492 F.2d 63. The decision and order of the Board (Pet. App. C1-C14) are reported at 202 NLRB No. 18.

Jurisdiction

The judgment of the Court of Appeals (Pet. App. B1-B2) was entered on February 15, 1974. The Petition for a writ of certiorari was filed on May 16, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Other Statutory Provisions Involved

In addition to the provisions of the National Labor Relations Act as amended (the "Act"), 29 U.S.C. 151 *et seq.*, set out in Appendix K to the Petition, this case also involves Sections 8(a)(1) and (2) and 10(f) of the Act, 29 U.S.C. 158(a)(1) and (2) and 160(f). They provide in pertinent part as follows:

> "Sec. 8.(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it:
>
> * * *
>
> Sec. 10.(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in * * * by filing in such a court a written petition praying that the order of the Board be modified or set aside * * * Upon the filing of such

petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section * * * the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall * * * be conclusive."

Questions Presented

1. Whether the Court of Appeals misapplied Section 10(f) of the Act in holding that "the Board's finding that the Union's efforts [to enforce an arbitration award directing the Company to apply the substantive terms of its collective agreement covering a unit of the Company's Long Island, New York employees to Company employees in Vallejo, California] were motivated by a desire to protect the job security of the Long Island employees and not by a desire to represent the Vallejo employees was not supported by substantial evidence" (492 F.2d at 68; Pet. App. A9).

2. Assuming that the Court of Appeals erred on Question "1" above, whether the Court of Appeals erred in holding that regardless of the Union's motivation, the Union's efforts to require the Company to apply the substantive terms of its collective bargaining agreement covering the New York unit to its California employees were a refusal to bargain in respect of the New York unit under Section 8(b)(3), when the Board had found the California employees to belong to a separate appropriate bargaining unit, the members of the California unit had voted against representation by the Union in an NLRB election, and

"there is no evidence that the terms of employment at the Vallejo unit affected the New York unit" (492 F.2d at 70; Pet. App. A14).

Statement of the Case

On April 19, 1971 an Arbitrator, authorized to determine whether certain California employees of the Company were "under the coverage" (E107) of a collective agreement covering a certified unit of the Company's New York employees, held (a) that the New York contract did not cover the California employees because it could not lawfully do so under the Act, but (b) directed, nevertheless, that the substantive provisions of the contract, not including the "Union Shop and other representation clauses", should be applied to those California employees (E127).* On May 10, 1971 the Union petitioned the Board to represent a unit including the California employees who had been the subject of the award (E133). On June 10 the Board

* Subsequent to the Union actions to enforce the award which gave rise to the NLRB proceeding now before this Court, the New York courts vacated the award upon two grounds: (1) that the award had gone beyond the issue submitted to the Arbitrator; and (2) that the award would have required the Company to violate §8(a)(1) of the Act under *International Ladies' Garment Workers' Union, AFL-CIO* v. *NLRB*, 366 U.S. 731 (1961), by requiring the Company to impose union-negotiated contract terms upon employees who had voted against union representation. *Sperry Division of Sperry Rand Corp.* v. *Local 445, I.U.E.R.M.W., AFL-CIO*, 80 LRRM 2061 (Sup. Ct. N.Y.Co., 1971), *affirmed*, 42 App. Div. 2d 691, 345 N.Y.S.2d 972 (1st Dept. 1973), *leave to appeal denied*, 33 N.Y. 2d 517 (1973). The Court of Appeals' decision also declared the award to be "repugnant to the Act" (492 F.2d at 70, n.8; Pet. App. A14), on the ground that "the Company could not have complied with * * * [it] without infringing upon the rights of the Vallejo employees in violation of §§8(a)(1) and (a)(2) of the Act" (492 F.2d at 70; Pet. App. A14).

determined a California unit to be appropriate for bargaining, and directed an election among the employees in that unit (E138-E139). On July 20, the last day under New York law for the Company to commence a proceeding to modify or set aside the award, New York Civil Practice Law and Rules §7511(a), the Company commenced a proceeding to delete the award's direction to apply the substantive terms of the contract to the California employees on the stated ground that the award was, to that extent, upon an issue not submitted to the Arbitrator (E163-E164).

On July 26 the Union filed a new grievance under the New York contract demanding that the Company comply with the award by, among other things, recalling the California employees whom the Company had laid off prior to the award for lack of work, and making them whole (E145). On August 5 the California employees voted against Union representation in the NLRB election (E218). On August 11 the Union pressed its grievance on behalf of the California employees, including its demand for recall of the laid-off employees, at a meeting with the Company in the New York plant (E228-E229). The Company then filed the refusal-to-bargain charge against the Union which has now reached this Court, alleging that the Union's attempts to require the Company to apply the substantive terms of the New York contract to California employees it did not represent, by using the grievance procedure of that contract, was a refusal to bargain in respect of the New York unit (E7).

On August 27, 1971 the Union referred its grievance filed July 26, 1971 to arbitration under the New York con-

tract (E149) and on September 9, 1971, it requested the designated arbitrator to arrange for arbitration (E153).

On December 27, 1971 the Board's General Counsel issued a complaint based on the Company's refusal to bargain charge (E11). There was a hearing on that complaint before a Board Trial Examiner (now called "Administrative Law Judge") on March 6, 1972.

On July 12, 1972 the Administrative Law Judge ("ALJ") issued his decision (Pet. App. D1-D23), finding that the Union's efforts to enforce the award "were motivated by a desire to preserve job opportunities for the Great Neck drafting employees" (Pet. App. D20) and that by its demand for the recall of the two laid-off employees, "[p]robably . . . [the Union] expected to win over the employees' support in the forthcoming election" (Pet. App. D21). On that basis, the ALJ recommended dismissal of the complaint (Pet. App. D23).

The Company filed exceptions to the ALJ's decision (A26a-30a), including a specific exception to the finding that the Union's recall demand could be understood as a bid for support in the "forthcoming" Board election, since the Union had repeated and pressed this demand after the election had already been lost (A26a-30a).

On September 11, 1972 the full five-man Board heard oral argument and on March 5, 1973, by a 3 to 2 majority, issued its decision and order finding no violation as alleged and dismissing the complaint (Pet. App. C1-C13). Referring to the issue raised by the Company's exception concerning the Union's recall demands, the Board majority

stated that they "may well appear at first glance at least to have representational overtones" (Pet. App. C8), but "did not rise to the level of a violation of Section 8(b)(3) * * * [because] there is no evidence that * * * [they] would have disrupted the ongoing bargaining relationship in the New York unit" (*id.*). In a footnote, the Board majority stated: "We do not deem it necessary to reach the question of whether or not the [ALJ] was correct in discounting the arguably representational nature of this demand as being merely an attempt to win employee support in the Vallejo election" (*id.*, n.2). The Company petitioned the United States Court of Appeals for the Second Circuit for review.

On February 15, 1974 the Court of Appeals granted the Company's petition for review, vacated the Board's order and remanded the case to the Board for further proceedings consistent with the Court's opinion.

Argument

1. The Court of Appeals first held that "the Board's finding that the Union's efforts [to enforce the arbitration award] were motivated by a desire to protect the job security of the Long Island employees and not by a desire to represent the Vallejo [California] employees was not supported by substantial evidence" (492 F.2d at 68; Pet. App. A9), and that "[t]he only reasonable conclusion is that the Union was seeking to represent the Vallejo [California] employees through * * * the grievance procedures in New York" (492 F.2d at 68; Pet. App. A10). That holding destroys the factual basis for the Union's argument to this Court (Petition, 7-8) that its actions to apply the terms of

a New York contract to California employees whom it did not represent were legitimatized by its interest in protecting the job security of the New York employees it did represent. For the Union's entire attack on the Court of Appeals' decision assumes that its motives were, in fact, solely to protect the New York employees, and not to represent the California employees. The Union does not claim that the Court of Appeals was wrong if the Union's motives were in fact what the Court found them to be.

While the Union does note in passing its disagreement with the Court of Appeals' findings on this critical question of fact (Petition, 9), the Union does not now suggest that this Court should grant certiorari to review the Court of Appeals' finding on the facts. And, as this Court made clear in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), it will only rarely grant certiorari to review a Court of Appeals' determination, like this one, that Board findings are not supported by evidence: "This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied" (340 U.S. at 491). The Union does not claim that this case presents that "rare instance".

Since all of the Union's stated reasons for seeking certiorari depend upon vacating the Court of Appeals' conclusion on the facts, it follows that the petition for certiorari should be denied.

2. The petition for certiorari should be denied even if the Court of Appeals erred in its findings as to the Union's motivations, for the Court of Appeals further held that "regardless of the Union's motive in seeking enforce-

ment of the arbitration award" (492 F.2d at 69; Pet. App. A11), the Union violated Section 8(b)(3), because "there is no evidence that the terms of employment at the Vallejo unit affected the New York City unit" (492 F.2d at 70; Pet. App. A14) and, therefore, "the subject of the wages and working conditions of the Vallejo employees was not a permissible subject of bargaining in the New York City unit" (492 F.2d at 69; Pet. App. A11).

The Union first attacks the Court's holding that California wages were not a "permissible" subject of bargaining (Petition, 7-8, 9, 11) as contrary to the principle enunciated in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964), *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283 (1959) ("*Oliver I*"); and *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612 (1967). Those three decisions held, or assumed (*National Woodwork*, 386 U.S. at 643), that certain subject matters, in the particular circumstances presented in those cases, constituted *mandatory* subjects of bargaining. Those subjects were: (1) "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment" in *Fibreboard* (379 U.S. at 215); (2) the minimum rental to be paid by an employer motor carrier who leased vehicles to be driven by their owners rather than by the carrier's employees in *Oliver I;* and (3) a work rule that "No * * * [carpenter] will handle * * * any doors * * * which have been fitted prior to being furnished on the job" in *National Woodwork* (386 U.S. at 615). But the Union concedes here that those three decisions—as to what are *mandatory* subjects of bargaining—are inapplicable

here, since it says in its Petition: "[t]he Union acknowledges that the work preservation clause it succeeded in negotiating [which the arbitration award purported to enforce to the extent lawful under the Act] is only a *permissive* subject of bargaining" (Petition, 9).

Moreover, unlike this case, none of the three cited cases involved bargaining with a union over the wages, hours and other substantive terms of employment of employees not represented by that union and within a different appropriate bargaining unit.*

The Union further asserts that in determining that the wages and working conditions of the California unit were not a *permissible subject* of bargaining in the New York unit, the Court of Appeals misapprehended this Court's holding in *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) in that, the Union asserts, *Pittsburgh* involved "determination of the existence of a *mandatory* subject of bargaining and has no application to a *permissive subject* lawfully incorporated as a term of the collective agreement" (emphasis in original) (Petition, 9). The Court of Appeals had no such misapprehension. It simply believed that the standard set by this Court in *Pittsburgh* for determining when the terms of em-

* *Oliver I* involved the fixing by an employer and union of terms of hire of persons whose status as employees or independent contractors the Court did not determine (*see* 358 U.S. at 297-298, dissenting opinion of Whittaker, J.). Assuming those persons to be employees, *Oliver I* is easily distinguishable on the ground that there the particular terms represented "a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining agreement" (358 U.S. at 294), whereas here, as the Court of Appeals found, "there is no evidence that the terms of employment at the Vallejo unit affected the New York City unit" (492 F.2d at 70; Pet. App. 14).

ployment of employees outside the unit is a *mandatory* subject of bargaining—"whether [the third-party concern] vitally affects the 'terms and conditions' of [bargaining unit employees'] employment" (404 U.S. at 179)—should also be applied to determine whether such a matter was within the scope of *permissible* bargaining (492 F.2d at 70; Pet. App. A13).* Applying that standard, the Court of Appeals found that "there is no evidence that the terms of employment at the Vallejo unit affected the New York City unit" (492 F.2d at 70; Pet. App. A14), and accordingly held that Vallejo terms of employment were not *permissible* subjects of bargaining in the New York unit.

3. The Union contends, finally, that "Section 8(b)(3) of the Act cannot be fairly construed to preclude the union from proceeding by arbitration to enforce Article I of its agreement" (Petition, 10),** relying on this Court's state-

* In *Pittsburgh*, we note, this Court said that "This is not to say that application of *Oliver* and *Fibreboard* turns only on the impact of the third-party matter on employee interests. Other considerations, such as the effect on the employer's freedom to conduct his business, may be equally important" (404 U.S. at 180, n. 19). In this case, the Court of Appeals placed its determination as to bargainability on such an "other" consideration: "the Company could not have complied with the arbitrator's award without infringing upon the rights of the Vallejo employees in violation of §§8(a)(1) and (a)(2) of the Act" (492 F.2d at 70; Pet. App. A11). The Union does not attack this finding in its Petition.

** The Union similarly contends that "Here there is not a scintilla of evidence that the Union did anything more than engage in the peaceful pursuit of its contract rights under the procedures prescribed in the collective agreement" (Petition, 11). That "peaceful pursuit of its contract rights" was aimed at achieving a second arbitration award holding that the Company had not complied with the first award and directing application of the substantive terms of the New York contract to the California employees. Such a second award might have freed the Union from its contractual no-strike commitment, which was not to strike during the term of the agreement "unless the Employer refuses or fails to conform to an award of an arbitrator rendered in accordance with the provisions of this Agreement" (E81). Thus the Union's "peaceful pursuit of its contract rights", if successful, would have resulted in freeing the Union to strike during its contract term.

ment in *Pittsburgh* that "The remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract" (404 U.S. at 188). But this case involves no such "permissive term"; the Court of Appeals held that Vallejo terms of employment were not permissible subjects of bargaining in the New York unit. *Pittsburgh* establishes no such right as asserted by the Union (Petition, 10) to proceed by arbitration to enforce impermissible contract terms. Nor are the Union-cited authorities (Petition, 10) construing the word "coercion" in Sections 8(b)(4) and (3) and Section 8(a)(1) of the Act of any relevance. This Union was charged with refusal to bargain, not coercion. Section 8(b)(3) of the Act does not except "peaceful" union refusals to bargain, nor those which can be cast as efforts to enforce alleged contract rights, whether by arbitration or otherwise, as to employees the union does not represent.

Conclusion

For all of the foregoing reasons the petition for certiorari ought to be denied.

Respectfully submitted,

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Dated: New York, N. Y.
June 15, 1974

In the Supreme Court of the United States

OCTOBER TERM, 1974

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LOCAL 445, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

SPERRY SYSTEMS MANAGEMENT DIVISION, SPERRY RAND CORP.

AND

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

1. Upon an unfair labor practice complaint filed by the Company, the Board (with Members Kennedy and Penello dissenting) held that the Union did not violate Section 8(b)(3) of the National Labor Relations Act, 29 U.S.C. 158(b)(3),[1] by insisting that the Company comply with an arbitration award directing it to apply the wage and other non-representational provisions of the bargaining agreement between the Company and the

---

[1] Section 8(b)(3) makes it an unfair labor paractice for a union "to refuse to bargain collectively with an employer * * * ."

Union, covering the technical employees at the Company's New York City plants, to certain unrepresented technical employees at the Company's California facility (Pet. App. C1-C13). This conclusion rested on the Board's findings that: (1) the arbitrator's ruling that application of the contract's work preservation clause to all Company facilities where unit work was performed was not clearly repugnant to the Act; (2) the Union had invoked the clause and had sought compliance with the resulting arbitration award for legitimate work-preservation reasons, and not to achieve unlawful recognition for the California employees; and (3) the Union's actions had not disrupted the bargaining relationship in the New York unit (Pet. App. C6-C9).

The court of appeals vacated the Board's dismissal of the complaint and remanded the case for further proceedings (Pet. App. A1-A14). The court found, contrary to the Board, that "the Union's activities in enforcing the award must be characterized as a *sub rosa* attempt to gain the *de facto* representation of the [California] employees," which it failed to gain through an earlier Board election (Pet. App. A11). The court further found that the operation of the California facility did not "vitally affect" the New York unit, and that thus, regardless of the Union's motive, its demand that the New York contract be applied to the California employees was not a permissible subject of bargaining in the New York unit (Pet. App. A11-A14). Accordingly, the court concluded that the Union's attempts to secure compliance with the arbitration award violated Section 8(b)(3) of the Act.

2. The court's rejection of the Board's position turns largely on its differing appraisal of the facts of this particular case. Thus, the court, like the two dissenting

Board Members, found that the dominant thrust of the Union's actions was to secure recognition as the representative of the California employees. Moreover, the court found that, on the facts of this case, the terms of employment for the California employees did not "vitally affect [those of] the unit employees." While the Board believes that its findings are supported by substantial evidence and should have been sustained by the court of appeals, the court's failure to do so presents essentially only an evidentiary issue, which is not appropriate for further review. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490; *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 410. The petition should therefore be denied.

Respectfully submitted.

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SEPTEMBER 1974.

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